77-1247

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

RONALD GIBSON,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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IN THE

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RONALD GIBSON,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

To the Honorable Chief Justice and Justices of the Supreme Court of the United States:

Petitioner, Ronald Gibson, respectfully prays for the issuance of a writ of certiorari directed to the United States Court of Appeals for the Third Circuit.

1. On December 15, 1977, an opinion and judgment thereon were filed in the Court of Appeals which reversed

a judgment entered in the U.S. District Court for the District of New Jersey dated June 15, 1976 which had adjudged the U.S. liable for plaintiff's injuries. (Garth, C.J. and Layton, D.J. for the majority; Adams, C.J. dissenting). (1a; 35a)

2. On February 1, 1978 the Court of Appeals filed an order denying plaintiff's motion for rehearing in banc or by the panel. (38a) One judge voted for rehearing (Rosenn, C.J.)

3. Jurisdiction over this application for certiorari is based on 28 U.S.C. Sec. 1254(1) and Sec. 2101 (c).

4. Plaintiff brought suit under the Federal Tort Claims Act which vested exclusive jurisdiction in the U.S. District Court, sitting without a jury. (28 U.S.C. Sec. 1346 (b)).

5. In 1972, the Court of Appeals for the Third Circuit reversed an Order of the District Court which had dismissed the complaint. The Court of Appeals opinion reversing the dismissal is reported at 457 F2d 1391 (3rd Cir. 1972). (75a)

Statutes Involved

Economic Opportunity Act of 1964, 42 U.S.C. Sec. 2711 et seq. (90a).

Federal Tort Claims Act, 28 U.S.C. Sec. 1346, 2670, 2680. (88a)

Questions Presented

Is the U.S. immune from liability to employees of an independent contractor under the Federal Tort Claims Act because O.E.O., a U.S. agency, entered into a contract with an independent contractor to manage O.E.O.'s Job Corps Center on a Federal reservation and to provide vocational training to educatable young men who were employees of the U.S. and who were selected by O.E.O. as educatable?

Is the U.S. liable for the failure or omission of O.E.O.'s operational employees on the Federal reservation to provide adequate measures and facilities for the safety of instructor employees of the contractor against a danger created by O.E.O. after the contractor commenced work?

Did the U.S. owe a duty to "exercise reasonable care to see that the contractor take proper precautions to protect those who might sustain injury from their work" at the Federal reservation?

Is the liability arising from breach of such a duty "strict" or "vicarious"?

Was there evidence regarding a breach by Government employees of the relevant duty of care to take reasonable measures to guarantee that adequate security was maintained at the Federal reservation (Job Corps Center) and that one of the Center's employees was injured as a result of a foreseeable risk stemming from such a breach?

Was the duty to provide adequate security measures a discretionary or operational function?

Was there direct negligence of an operational employee of the U.S.?

Is the determination by the Court of Appeals in conflict with *McGarry* v. *U.S.*, 549 F2d 587 (9th Cir. 1976) cert. den. October 31, 1977 and *Logue* v. *U.S.*, 421 U.S. 521 (1973)?

Considerations Pertaining to Rule 19 of the Supreme Court

Circuit Judge Adams, in his dissenting opinion (22a) points out that the record

> "does support the theory that the United States itself breached a duty of care to (plaintiff); that
>
> "5. United States v. Orleans, 425 U.S. 807 (1976), which the majority relies upon in rejecting the theory of the government's *vicarious liability,* has nothing to do with the theory of the government's *direct negligence* in this case." (25a)

And Circuit Judge Adams cites *McGarry* v. *U.S.,* 549 F2d 587 (9th Cir. 1976) cert. den. 98 S.Ct. 398, October 31, 1977 where the trial court had found that

> "the AEC had failed to exercise reasonable or any care to see that proper safety precautions were taken by REECO with reference to work performed in the neighborhood of the power line" (27a) and that
>
> "Liability of the government for a breach of the duty of care articulated in McGarry is not foreclosed by a claim of sovereign immunity" (27a)

Preliminary Statement

As part of the Economic Opportunity Act of 1964, Congress established the Job Corps for the purpose of assisting low-income, disadvantaged young people by establishing rural and urban centers in which enrollees would participate in programs of education, vocational training, work experience and other activities. 42 U.S.C. Sec. 2711 (now 29 U.S.C. Sec. 911).

By virtue of 42 U.S.C. Sec. 2714, the Director of the Office of Economic Opportunity was authorized to prescribe rules for the screening and selection of applicants for enrollment in the Job Corps; 42 U.S.C. Sec. 2715 provided that no individual was to be selected as an enrollee unless it was determined that "he is not likely to engage in actions or behavior that would prevent other enrollees from receiving the benefit of the program or be incompatible with the maintenance of sound discipline . . ." Section 2720 provided that "within the Job Corps centers, standards of conduct and deportment shall be provided and stringently enforced."

On December 1, 1964, a contract was entered into between the O.E.O. and the Federal Electric Corporation (F.E.C.) by which F.E.C. agreed to operate a Job Corps residential training center for boys at Camp Kilmer, Edison, New Jersey.

Relevant portions of the contract appear in appendix A of the trial judge's Opinion. (68a)

Camp Kilmer (at Edison, N.J.) was a former Army barracks consisting of 50 old dormitory buildings plus other buildings to be used as classrooms and an administration building. (CT 2:107, 108)

O.E.O. selected, enrolled the recruits as Federal employees throughout the country and delivered many of them to Camp Kilmer for vocational training.

In the first few months, the enrollees who arrived at Camp Kilmer were basically sincere, educatable young men. (CT 2:165)

Thereafter, a large proportion of the new enrollees were drug addicts and juvenile offenders with records for violent crimes. (CT 2:185)

The result was that, prior to November 5, 1966 (when Gibson was injured), there were numerous fights involving up to 100 or more men and a narcotics problem at the Camp. (CT 1:63, 2:123)

In 1966, Security was provided by 4 unarmed guards for each shift with 1,000 or more enrollees. There was no detention or isolation facility at the Camp. (CT 2:107, 109)

Since Camp Kilmer was a Federal reservation under the sole, exclusive jurisdiction of the U.S., requests were made to deputize the guards as U.S. Marshals and to provide an isolation or detention facility, it being noted that similar authority and an isolation facility were provided at Job Corps Camps in other states. Only the U.S. could deputize the guards as U.S. Marshals. (CT 2:172, 174)

O.E.O.'s operational employees for Camp Kilmer were a Contracting Officer, a Project Manager, an On Site representative with an office in the Administration Building together with various investigators and inspectors at least 3 of whom were at the Camp every week. (CT 4:45)

The deterioration in the type of enrollee, the fights, the narcotics problem, the lack of adequate safety facilities and precautions were well known to all of the above operational employees of O.E.O.

In September, 1966, the Job Corps Director issued an "internal memorandum" to all O.E.O. Project Managers and On Site Representatives, that

> "The Center will provide an on site facility for the isolation of those corpsmen whose behavior constitutes a threat to themselves or any other person or property." (Fogelman CT 4:78)

However, O.E.O.'s operational employees for Camp Kilmer failed to implement this directive, though in June, 1966 they had been advised that:

> "Kilmer proposes that some form of arrest authority be obtained for its security guards. In turn, a facility will be required to retain personnel for short periods of time in emergency cases. There have been cases in which Corpsmen were returned to the Center two or more times in one night because there is no physical means for restricting them to the Center." (Ex. P7)

Thus, on November 5, 1966, Jessie, the job Corpsman who was placed by the Security guards in the makeshift dormitory room—substituting for an isolation facility—promptly walked right out and thereafter drove the screw driver into Gibson's brain. (Gibson CT 12, 14)

In 1967, after these O.E.O. operational employees were replaced, the U.S. did deputize the guards as U.S. Marshals and did provide a detention facility. (CT 1:121, 122)

Plaintiff, Gibson was employed as a group leader to live in the dormitories with corpsmen and had daily group meetings with the corpsmen assigned to him. His chosen profession was sociology and in 1966 he was 26 years old.

The trial judge found:

1. That Camp Kilmer was a Federal Reservation over which the U.S. had sole and exclusive jurisdiction (and owned and had title to all buildings, facilities and equipment thereon. (47a)

2. That O.E.O. did the selecting of trainees throughout the country and sent them to Camp Kilmer, as Federal employees, for vocational training by F.E.C. (48a)

3. That the quality of the trainees steadily deteriorated so that known drug addicts and criminal offenders were sent to Camp Kilmer by O.E.O. and F.E.C. complained to O.EO. (49a)

4. That there were only 4 unarmed security guards at each shift for 1000 trainees and there was no isolation or detention facility provided. (48a)

5. That reports of all incidents and the conditions at the Camp were made at least once a week by O.E.O.'s on site representative and were known to O.E.O.'s contracting officer and to the Project Manager for Camp Kilmer who was also aware that a narcotics addiction problem existed at the Camp. (48)

6. That prior to the attack upon plaintiff, "there were numerous incidents of corpsmen's misbehavior, including fights sometimes involving 100 or more enrollees and intoxication due to alcohol and drugs. Security personnel were concerned over the possibility of a riot but managed to contain all incidents before general riots developed." (48a)

7. That at the request of the Contracting officer, the Kilmer Center staff in June, 1966 prepared a "Kilmer Improvement Plan" which stressed the need for deputization and a detention facility "because there is no physical

means for restricting them to the Center." O.E.O.'s Project Manager was aware of the Plan. (49a, Ex. P. 7)

8. That in September, 1966, O.E.O. (Washington) issued ("an internal memorandum" to its Project Managers, on site representatives and other operational employees) which required each Job Corps Center to provide an on site facility for the isolation of corpsmen "whose conduct constituted a threat to themselves, other persons or property." "The bulletin, however, was never implemented." (50a) (It was not implemented until after O.E.O.'s then operational officers at Kilmer were replaced in 1967 by a new Contracting Officer and a new Project Manager. In 1967 the U.S. did deputize the security guards as U.S. Marshals and did provide a detention or isolation facility. (Thomas CT 6:15-5; James CT 1:121, 122)

The trial judge did find that "although O.E.O. had broad supervisory authority over the Camp Kilmer Job Corps Center, control over the Center's day to day operations resided in F.E.C." (47a)

The Court concluded that O.E.O. had reserved to itself the right to control the manner in which the work is to be performed (65a); and that "The Government breached its duty when it failed to provide for adequate safety precautions." (67a) The trial Court thereupon adjudged the U.S. liable for the injuries sustained by plaintiff.

We submit that the uncontradicted facts in the record support the trial judge's determination that the U.S. is liable.

Under applicable New Jersey law, the U.S., as owner of the land, the buildings, all facilities, equipment, and supplies thereon and employer of the 1000 or more enrollees, is liable to employees of an independent contractor for a dangerous situation O.E.O. itself created by selecting and

placing violent and drug addicted enrollees in a vocational training camp and the failure and omission of O.E.O.'s Kilmer Project Manager and Contracting Officer to provide adequate safety precautions for the safety of instructors and to provide that which only the U.S. (through these operational officers) could provide on its Federal reservation:—

> Deputization of the security guards as U.S. Marshals and a detention facility "to isolate corpsmen whose conduct constituted a threat to themselves, other persons or property."

That failure or omission on the part of the then operational officers of O.E.O. was a proximate cause of the plaintiff's injuries.

Statement of the Case

After the enactment of the Economic Opportunity Act and the establishment of the Office of Economic Opportunity, Job Corps Centers were set up in various parts of the country. Some of these Job Corps Centers were directly operated by other government departments such as Department of Sports Fishing in the Far West; and the Department of Agriculture also operated some small centers. (Fogelman, CT 5:80)

On December 1, 1964 Office of Economic Opportunity and Federal Electric Co. as Contractor entered into a contract by which Federal Electric Co. agreed:

"PART II SCOPE OF WORK

The definition of scope of work of this contract shall be the operation and maintenance of a Job Corps residential training center, and the educating, training and otherwise

providing for the general welfare of young men hereafter referred to as Enrollees, in such manner as directed by the Director of the Job Corps, to assist in the efficient accomplishment of the Office of Economic Opportunity duties, responsibilities and mission, principally at the site identified under the Part of this Contract entitled Site." (68a)

"PART XII ASSIGNMENT AND SEPARATION

The Project Manager shall specifically inform the Contractor of the Enrollees assigned by the Job Corps to the Training Center to be operated under this contract.

The separation or discharge of an Enrollee from the Training Center shall be the sole responsibility of the Director of the Jobs Corps." (68a)

"PREPARATION AND REVISION OF POLICIES AND PROCEDURES

The Contractor shall prepare and revise as necessary, in accordance with O.E.O. policies, subject to the approval of the Contracting Officer, and implement as approved by the Project Manager, the policies and procedures under which operation and maintenance functions necessary to support the said Training Center will be performed." (73a)

O.E.O.'s Contracting Officer had the reserved right to direct F.E.C. to requisition "Logistical Support" consisting, among other items, of Equipment and Facilities (74a); and also the reserved right to direct "Services" under which is listed "6. Physical Security" (not otherwise defined). (74a)

F.E.C. could not provide a meal or lodging at the Center to anyone "except on terms or at prices approved by the Project Manager" and "all revenues generated at the Training Center shall be collected, disbursed and further handled as directed by the Project Manager." (70a)

O.E.O., through its Contracting Officer itself arranged for and provided snow removal services at the Job Center site. Such service was not provided by F.E.C. (Fogelman CT 5:37)

The U.S. Army Corps of Engineers had responsibilities on the base for construction and were constructing new buildings at that time at Camp Kilmer. (Fogelman CT 5:37)

O.E.O. had its own engineering group also. (Fogelman CT 5:38)

Camp Kilmer was a Federal Reservation located at Edison, New Jersey, owned by and under the exclusive jurisdiction of the Federal government. (Fogelman CT 4:74 and 5.5)

On the site at Camp Kilmer and assigned to the Job Corps were 50 dormitory buildings (formerly Army barracks) as well as other buildings used for classrooms and an administration building (in which O.E.O.'s On site Representative had his office in 1966). (James CT 2:107, 108)

The operational employees of O.E.O. with respect to the Job Corps Center at Camp Kilmer were:

Contracting Officer—Milton Fogelman

Project Manager—Carol Thomas

On Site Representative—Allen Weber

Messrs. Fogelman and Thomas were produced by the U.S. at the trial and testified.

The On Site Representative was not produced by the U.S.

In addition to O.E.O.'s on the site representative at Kilmer, "there was never a week where there weren't two or three people there for various reasons. One might be checking food services, maybe checking the condition of dormitories. One may be checking whether or not the hospital was sanitary.

"Each one had a separate assignment but there was very close surveillance." (Fogelman CT 4:45)

O.E.O. also had a Security investigator at Washington who would "visit the Center and conduct investigations or inspections, rather." (James CT 2:122)

Plaintiff produced the following witnesses who had been employed by Federal Electric:

Willie R. James—Assistant to Security Administrator

Joseph F. Zimmer—Manager of Contract Administration

Gaddis A. Johnson—Investigator, Security Dept.

Milton Fogelman, as Contracting Officer for O.E.O. was assigned the responsibility to oversee and maintain observation of all of the business aspects of O.E.O.; and the Contracting Officer's responsibility when entering into a contract was "to assure that the security or that adequate security could be provided not only to the grounds and to the buildings but the corpsmen as well." (Fogelman CT 4.4, 425)

Carol Thomas, as Project Manager for Kilmer operating out of Washington, from 1965 to January, 1977—"was responsible for ensuring the efficiency and the quality and viability of the educational program, as well as all aspects of the program which related to the enrollees." (Thomas CT 5.123, 124)

Physical security extension measures came within his approval authority which he defined as "the personal security of personnel, meaning staff and enrollees living on the center as well as the physical security of buildings and equipment at the Center." (Thomas CT 5.133-13)

Allen Weber, as O.E.O. On Site Representative, was directly responsible to the Project Manager, acted as the Project Manager's "eyes and ears", submitted a weekly report to the Project Manager (Thomas) on all significant events transpiring at the Center. (Thomas CT 5.127, 128)

Weber was a "rapid liaison" with Washington. Weber would report problems to Washington by telephone or a weekly report. "If (Weber) indicated there was a continuing problem then probably somebody from the program office would have immediately gone to straighten it out." (Fogelman CT 4:58, 59)

Weber had no authority over the Center Director. "He was strictly advisory for my (Thomas) purposes." (Thomas CT 5.127)

However F.E.C.'s Contract Manager considered O.E.O.'s site representative "was essentially an operations officer for O.E.O. at the Center in a general liaison capacity." (Zimmer CT 2:154)

Thomas directed Federal Electric Co. to have Weber receive a copy of all documents, so that Thomas would not "have to reproduce it and send it all the way back down there when he was right there in the same building with them." (Thomas CT 5.134)

"Security" in the year 1966 was provided by 3 shifts, each of 4 unarmed guards, with no arrest authority and with no detention or isolation facility to patrol the area for 1,000 enrollees. (James CT 2:107, 109)

Security staff could not physically control and isolate a corpsman since there was no place to isolate the corpsman. (James CT 84, 85, 94)

Instead of a detention facility, dormitory 2132 was used. Dormitory 2132's "physical layout was just like any other ordinary dormitory. There was no locker (lockup) facilities or anything like that. It was a dormitory . . . that was used to place corpsmen that had special type problems." (James CT 2:109)

If an isolation facility were complicated it would require the U.S. Corps of Engineers. (Fogelman 4:80)

O.E.O., in the early days of the Center, contacted the F.B.I. as to possible need for F.B.I. cooperation at the Job Centers. (Thomas CT 6.6)

The number of guards or security personnel was determined with O.E.O.'s Contracting Officer at the time of renegotiation of the contract. "So (Federal Electric) was 'severely limited in the number of people we could put on the job and the salaries that we could pay these people.'" (Zimmer CT 2:220, 221)

Camp Kilmer received the first enrollees in February, 1965. The first enrollees were boys from disadvantaged homes, who were basically very sincere and interested in improving themselves. "They came in without any kind of criminal record or dope record or what have you, and really got into the program." (Zimmer CT 2:165)

The enrollees in February or March, 1965, were not as disruptive as the enrollees subsequently. (James CT 1:66)

In February, 1966, F.E.C. notified the O.E.O. Contracting Officer that there was a general deterioration in the candidates Camp Kilmer was getting. (Zimmer CT 2:164)

F.E.C. told the O.E.O. Contract Officer that the camp was "getting candidates with past records of misdemea-

nors, felony, drug records and that kind of thing." (Zimmer CT 2:185)

O.E.O.'s contracting officer stated that in many cases (enrollees) were in institutions when (O.E.O.) received them and (O.E.O.) had no one to send them back to. (Fogelman 5.57)

The security assistant to the Camp Kilmer Security Administration had formerly been an officer at the New Jersey State Home for Boys, Jamesburg, New Jersey. He was at the Center from February, 1965 until 1968. (James CT 1:61)

Prior to November, 1966, at Camp Kilmer, there were assaults, narcotic violations and related incidents committed by Job Corpsmen. (James CT 1:63)

Fights or outbreaks involved sometimes 4 or 5, sometimes 12, sometimes 100 or more corpsmen. Security was able to contain "a lot of serious incidents" with the help of the guards, investigators and some of the corpsmen. (James CT 2:123)

Because of the frequency of the incidents, the Security Assistant made recommendations as to procedure to be followed in security to the security administrator, and the other management personnel at the Center and a copy of his report went to O.E.O.'s on site representative, Mr. Weber. (James CT 1:63)

Because the type of enrollees changed, the needs and requirements to carry out the program also changed and the camp "would have to have . . . a detention, isolation facility where you could control problems as they arose or minimize the effect or keep them under better surveillance." (Zimmer CT 2:239)

In February, 1966, F.E.C. asked the Contracting Officer for armed guards and a detention facility, "some kind of

a jail facility where we could place uncontrollable kids until proper action could be taken to either get them out of the Center or put them under the proper Federal control." (Zimmer CT 2:172)

In February, 1966, discussions were had between O.E.O.'s contracting officer (Fogelman) and F.E.C.'s Contract Manager (Zimmer) as to the next year's contract and Zimmer, on behalf of F.E.C. requested both armed guards and an isolation facility (Zimmer CT 172). Fogelman told Zimmer point blank that no Federal Marshals would be permitted at Camp Kilmer though there were U.S. Marshals at Camp Gary, Texas. (Zimmer CT 2:174)

Fogelman suggested to Zimmer that F.E.C. submit a general plan of how the Center could be improved. (Zimmer CT 173)

A document captioned, "Kilmer Improvement Plan" was prepared by various staff members of Camp Kilmer and copies distributed. (Ex. P-7, Zimmer CT 173) Included in the Plan is the following:

> "Arrest and Confinement Authority". "Kilmer proposes that some form of arrest authority be obtained for its security guards. In turn, a facility will be required to retain personnel for short periods of time in emergency cases. There have been cases in which Corpsmen were returned to the Center two or more times in one night because there is no physical means for restricting them to the Center." (Ex. P-7)

Carol Thomas testified that:

During the course of the negotiations for the initial contracts there were discussions as to the caliber of the enrollees to be supplied by O.E.O. as to racial, academic and

economic background "and there were certain things that the contractor would have to gear his program for as a result." (Thomas CT 5.124, 125)

That he fulfilled his overseeing responsibilities by telephone from Washington, by site visits, by talking with the Center Director and other staff members as well as enrollees and made his own observations of what was going on. (Thomas CT 5.126, CT 5.127)

In addition, Thomas had Weber acting as his "eyes and ears" from January, 1966. (CT 5.127)

Thomas received reports of a narcotics addiction problem among the enrollees at Kilmer from the Center Director and some other staff members. (Thomas CT 5.130)

F.E.C. asked him if "they were in essence getting their fair share of 'difficult' as opposed to good, if you will kids." (Thomas CT 5.138)

Thomas arranged with F.E.C. for the following procedures if F.E.C. desired to implement a program:

"We would discuss it informally first on any number of occasions until we were pretty much in agreement that we were ready for them to put in writing . . . and then they would send it to me." (Thomas CT 5.134)

In June, 1966, approximately 10 corpsmen threw stones at cars passing by the Camp's main gates which resulted in complaints to O.E.O. from the Mayors of the adjoining towns. (Thomas 6.2). Thomas drafted a letter to the Mayors which was signed by the Associate Director of the Job Corps, Washington and sent to the Mayors. (6.2) Thomas also contacted the Mayors and met with one of them. (6.5)

This letter to the Mayors of Edison and Piscataway from the Associate Director outlines—

> "very concrete steps that were to be taken to try to improve the behavior of the corpsmen, to bring them a sense of responsibility for their actions, from physical things, such as better lighting and other things that would have to do with crowd control." (Fogelman 5:49)

In September, 1966, a memorandum was issued by the Associate Director of the Job Corps which stated:—

> "The Center will provide an onsite facility for the isolation of those corpsmen whose behavior constitutes a threat to themselves or any other person or property." (Fogelman 4:78)

This was an *"internal"* document that guided the personnel of Job Corps Men's Centers. It was a guidance document to the personnel of Job Corps Men's Centers, not the contractors, (such as Federal Electric). (Fogelman CT 5.11)

And this memorandum was for:—

> "Project Managers, government employees, site representatives, those who are responsible for the surveillance and monitorship of the operations—this is internal, this was in Washington, this said project managers will follow the rules." (Fogelman CT 5.77)

However, Thomas, O.E.O.'s Project Manager testified that he would have to approve an isolation facility from the program point of view if one were to be installed. (6.11)

> "Q. And you say there was no deputization and no isolation facility followed (allowed) that was why (while) you were Project Manager, correct?
>
> (Thomas) "A. Yes.

"Q. You don't know what happened—that was only until January, 1967, right?

"A. Yes.

"Q. You don't know what happened after that?

"A. No, I do not. Only hearsay." (Thomas CT 6:15-5)

In 1967, *after* Messrs. Fogelman and Thomas were no longer Contracting Officer and Project Manager for Kilmer, and *after* plaintiff sustained his brain injury, the U.S. provided an isolation facility at Camp Kilmer and the U.S. deputized the guards. (James CT 1:121, 122)

CONCLUSION

Petitioner respectfully prays that a writ of certiorari be issued directed to the Court of Appeals for the Third Circuit.

Respectfully submitted,

S.M. Chris Franzblau
Attorney for Petitioner

APPENDIX A

Opinion of the United States Court of Appeals for the Third Circuit

UNITED STATES COURT OF APPEALS

For the Third Circuit

No. 76-2490 and 76-2673

Ronald Gibson,

Plaintiff-Appellee and
Cross-Appellant,

v.

United States of America,

Defendant-Appellant and
Cross-Appellee.

(D. C. Civil No. 1147-68)

Appeal from the United States District Court
For the District of New Jersey

[1a]

Appendix A

Argued October 17, 1977

Before: ADAMS and GARTH, *Circuit Judges,* and LAYTON,* *District Judge.*

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* The Honorable Caleb R. Layton, 3rd, United States District Court for the District of Delaware, sitting by designation.

Appendix A

OPINION OF THE COURT

(Filed—December 15, 1977)

GARTH, *Circuit Judge*

This is the second time we have had this case before us on appeal. Plaintiff Ronald Gibson brought this action against the United States under the Federal Tort Claims Act, 28 U.S.C. §§ 1346, 2670-2680 (1970) [FTCA],[1] hav-

[1] The relevant sections of the FTCA provide:

> Subject to the provisions of Chapter 171 of this title, the district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages . . . for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. § 1346(b).

> As used in this chapter and sections 1346(b) and 2401(b) of this title, the term—
>
> "Federal agency" includes the executive departments, the military departments, independent establishments of the United States, and corporations primarily acting as instrumentalities or agencies of the United States, but does not include any contractor with the United States.
>
> "Employee of the government" includes officers or employees of any federal agency, members of the military or naval forces of the United States, and persons acting on behalf of a federal

(Footnote continued on following page)

ing suffered an injury from an assault which occurred on November 5, 1966 at the federal Job Corps Center at Camp Kilmer, in Edison, New Jersey. The Kilmer Center was operated by Federal Electric Company [FEC] under contract with the Office of Economic Opportunity [OEO], an agency of the United States. Gibson filed suit on November 1, 1968 in the District of New Jersey. The district court dismissed the complaint on the ground that the FTCA, 28 U.S.C. § 2680(h), which exempts the United States from tort liability for the assaults and batteries of its employees, prohibited recovery. On appeal, this court reversed, holding that the facts as pleaded (which included an allegation that the United States had operational control of the Center) stated a claim upon which relief could be granted. *Gibson* v. *United States,* 457 F.2d 1391 (3d Cir. 1972).

On March 17, 1975, after a non-jury trial limited to liability, the district court filed an opinion (dated March 14, 1975) holding that, since the United States did *not* have day-to-day control of the Center, it could not be liable for failing to control Gibson's assailant. The district court, however, went on to hold the Government

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(Footnote continued from preceding page)

agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation.

28 U.S.C. § 2671.

The provisions of this chapter and section 1346 (b) of this title shall not apply to . . . any claim arising out of assault, battery. . . .

28 U.S.C. § 2680(h).

liable for the negligent acts of FEC's (the contractor's) employees, under the doctrine of *respondeat superior.* Alternatively, it held the Government liable under the theory that a contractee is vicariously liable for the negligence of its independent contractor when the work performed is "inherently dangerous."

On May 20, 1976, after a bench trial on damages the district court in an unpublished opinion assessed damages at $106,980, but refused to include damages claimed because of Gibson's alleged inability to attain a doctoral degree. The court held that Gibson's ability to realize his professional goals had not been substantially hindered by his injury.

On June 8, 1976 Gibson filed a Rule 52(b) motion seeking reconsideration on the issue of damages. On June 15, 1976 the district court entered judgment against the United States in accordance with its May 20 opinion, but at that time did not dispose of the Rule 52(b) motion.[2]

On September 17, 1976 the district court denied Gibson's Rule 52(b) motion. Both parties timely appealed, Gibson on the issue of damages (at No. 76-2490), and the United States on the issue of liability (at No. 76-2673).

When the district court ruled in favor of Gibson on the issue of liability, it did not have the benefit of the

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[2] On August 12, 1976, the United States filed a notice of appeal at No. 76-2310, appealing from the judgment of June 15, 1976. Since the pending Rule 52(b) motion suspended the finality of the June 15 order, *see* Fed. R. App. P. 4, the Government's appeal was taken from a non-final order. The Government so conceded at oral argument. Accordingly, the appeal at No. 76-2310 was dismissed by the Clerk on October 31, 1977, pursuant to Fed. R. App. P. 42(b), per stipulation of the parties.

Supreme Court's opinion in *United States* v. *Orleans*, 425 U.S. 807 (1976), which was decided more than a year after the liability trial had concluded. Because we believe that *Orleans* controls, we must reverse, although we do so reluctantly in light of the eleven year history of this case.[3]

I.

In 1972 our first opinion, at 457 F.2d 1391, set out the factual background in somewhat greater detail than we find necessary to repeat here. Thereafter, the district court's unpublished opinion on liability only made extensive findings of fact, which, as they relate to the issues before us now, are summarized briefly as follows:

A. *The Accident*

The Job Corp was created as part of the Economic Opportunity Act of 1964, 42 U.S.C. § 2711 (now 29 U.S.C. § 911), to assist disadvantaged youths by establishing rural and urban centers in which enrollees would participate in educational programs, vocational training, work experience, and other activities. The Director of OEO was authorized to enter into contracts with private contractors for the operation of Job Corps centers. Camp Kilmer was a residential training center for boys, operated by FEC pursuant to a contract with OEO.

Ronald Gibson was employed by FEC as a group leader at Kilmer. As such he lived in the dormitories. On the

[3] Because we reverse on liability, we do not reach the issue of damages.

night of November 5, 1966, one of the enrollees, Andrew Jessie, became involved in several arguments and disturbances. After the second incident, Gibson took Jessie to the duty officer in charge of security, who may have placed Jessie in the security dormitory.[4] Shortly thereafter Jessie returned to Gibson's dormitory and became involved in another disturbance. Gibson instructed the security personnel to leave, and he tried to calm Jessie. Gibson then went to the latrine section. Jessie followed him and stabbed him in the temple with a screwdriver, inflicting severe injuries.

B. *The Respective Duties of OEO and FEC.*

Camp Kilmer was a federal reservation. There was a permanent OEO on-site representative at the Kilmer Job Corps Center, and a project manager in Washington. The OEO had broad supervisory authority over Camp Kilmer, and many aspects of the Camp's operation were subject to OEO approval. The OEO was solely responsible for choosing enrollees,[5] and for approving center staffing.

[4] The evidence and the findings below are not clear as to whether or not Jessie was actually placed in the security dormitory. If he was placed there, however, he did not remain so confined.

[5] The district court found that

> 42 U.S.C. Sec. 2715 provided that no individual was to be selected as an enrollee unless it was determined that "he is not likely to engage in actions or behavior that would prevent other enrollees from receiving the benefit of the program or be incompatible with the maintenance of sound discipline. . . ." Section 2720 provided that "within the Job Corps centers standards of conduct and department shall be provided and stringently enforced."

Finding of Fact No. 2, Dist. Ct. Op. of March 14, 1975, at 8, Appendix at 13a.

Nevertheless, as found by the district court, (Finding of Fact No. 6, Dist. Ct. Op. of Mar. 14, 1975, at 8, Appendix at 14a), *control over the Center's day-to-day operations resided in FEC.*

C. *Security at the Kilmer Center.*

At the time of Jessie's assault on Gibson, FEC had four or five unarmed, civilian security employees assigned to each shift. These security officers were not empowered to make arrests. One security dormitory at Kilmer was used to segregate enrollees who created disciplinary problems. That dormitory was identical to the other dormitories and had no special security features, bars, or locks.

Under its contract with OEO, FEC was responsible for taking "all reasonable steps and precautions to prevent accidents and to protect the life and health of Contractor [FEC] . . . personnel performing or in any way coming in contact with the performance of . . . this contract. . . ." (Part XIX of Contract).[6] FEC had authority to remove physically from the Center any enrollee causing disciplinary problems.

OEO also disseminated guidelines for controlling the conduct of the enrollee corpsmen. In Bulletin J/M 67-1,

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[6] The contract appears in the Record as Plaintiff's Exhibit P-9. The page of the contract (page 9) containing Part XIX is missing from the Exhibit. It is the only page missing from the 57-page contract and schedule. The language of Part XIX quoted in the text is taken verbatim from the Government's Brief at 9-10. No issue has ever been taken with this language by Gibson. We therefore attach no significance to the fact that page 9 is missing from the contract placed into evidence, attributing its absence to an inadvertent error in collation.

dated September 19, 1966, (Government Exhibit G-1), the OEO required that "each Center must develop and enforce those rules that are necessary for its orderly functioning. . . . Beyond this, Centers have an obligation to create an atmosphere that promotes adherence to acceptable standards of behavior. . . ." This same bulletin additionally provided that it was the responsibility of the Job Corps Headquarters [OEO] to define general policy regarding discipline, and the responsibility of each Center [FEC] to develop and enforce disciplinary rules. The Bulletin also specified that an on-site isolation facility should be maintained for corpsmen whose behavior constituted a threat to themselves or to any other person or property, and that physical restraint and isolation could be used, but only to the extent necessary to gain control of the corpsmen who posed a threat.

Prior to the attack on Gibson there had been numerous incidents of misconduct by enrolled corpsmen, and the OEO had received reports concerning these disciplinary problems. In addition, FEC security personnel had discussed with the OEO on-site representative the need for a secure isolation facility and for deputization of the guards as Deputy U.S. Marshals with arrest authority. (In fact, this was part of an improvement plan (Exhibit P-7) prepared by the FEC staff at Kilmer, but never submitted to OEO for approval.) FEC, however, never requested assistance from OEO in dealing with its discipline problems, and never formally sought permission to build a security facility or to obtain arrest authority for its guards.

II.

The facts found by the district court which we have summarized in part IB of this opinion, when examined

in light of the recent decision in *United States* v. *Orleans, supra,* lead to the conclusion that the district court erred in imposing liability on the United States for the negligence of FEC, its independent contractor, under both of the district court's theories of vicarious liability.

The plaintiff in *Orleans* brought suit against the Government under the FTCA when he was injured in an automobile accident. The plaintiff alleged that his injury was caused by the negligence of an employee of a community action agency funded under the Economic Opportunity Act of 1964. That agency operated community centers under a contract with OEO. Its employees were not federal employees.[7] The Supreme Court concluded that since OEO did not exercise detailed control over the physical performance of the community agency's tasks, the community agency was an independent contractor, and as such the United States could not be held liable for the negligence of the agency's employees. The Court observed that the FTCA waived sovereign immunity only for the "negligent and wrongful act or omission of any employee of the Government", 28 U.S.C. § 1346(b), and that "employee" included employees of any "federal agency", *id.* § 2671, but that a "federal agency" was defined in § 2671 as *not* including "any contractor with the United States",

[7] We recognize that in our case Jessie has been found by the district court to be a federal employee. Finding of Fact No. 41, Dist. Ct. Op. of March 14, 1975, at 13, Appendix at 19a. That difference between this case and *Orleans* is not significant because here Gibson complains of FEC's (and its employees') actions in failing to supervise Jessie properly, rather than the actions of Jessie himself. It is clear that Jessie's actions cannot be imputed to the United States because the FTCA does not apply to any "claim arising out of assault [or] battery. . . ." 28 U.S.C. § 2680(h). *See* note 1, *supra.*

id. The *Orleans* Court then characterized the question as "not whether the community action agency receives federal money and must comply with federal standards and regulations, but *whether its day-to-day operations are supervised by the Federal Government,*" 425 U.S. at 815 (emphasis added).

A. Respondeat Superior.

Applying the *Orleans* standard to the facts of the case *sub judice* compels us to conclude that the district court erred by its imposition of *respondeat superior* liability upon the United States. While it may be argued that the OEO exercised a greater degree of control over the Job Corps program and the FEC, than it did over community action agencies of the type involved in *Orleans,* nonetheless the district court specifically found that the Government exercised no operational, day-to-day control over Camp Kilmer or FEC's employees.[8]

Under *Orleans* the United States may not be held vicariously liable for the negligence of FEC as an independent contractor (28 U.S.C. § 2671), or that of FEC's

[8] Gibson makes the argument that *Orleans* was also based on the fact that the community action agencies involved in that case were "local" in character, and that this case is distinguishable in that the Job Corps program was a national one, and did not have a "local" character. While we agree that the Court in *Orleans* may have been influenced in part by the "local" nature of the community action agency, the key to the Court's holding was clearly the lack of operational control by the Government (despite its close supervision of the community action agency, 425 U.S. at 807), and accordingly the Court only looked to the community action agency's "local" character for additional support for its conclusion. *See* 425 U.S. at 817-18.

employees, in failing to supervise or control Jessie. This result is required by the language of the FTCA, as construed in *Orleans*. The fact of broad, supervisory control, or even the potential to exercise detailed control, cannot convert a contractor into an agent, nor can it be the basis for imposing vicarious liability on the United States. *United States* v. *Orleans*. Thus, the district court erred in concluding that the Government could be liable under the doctrine of *respondeat superior* because it "retained sufficient control of the manner in which FEC's work was to be performed." (Dist. Ct. Op. of Mar. 14, 1975 at 25, Appendix at 31a). *See also Logue* v. *United States,* 421 U.S. 521 (1973). Indeed, this court and other courts have consistently held that the United States cannot be vicariously liable for injuries to workmen on Government construction sites, solely because the Government has retained control over the work and safety practices of the independent contractor whose negligence caused the injury. *See Fisher* v. *United States,* 441 F.2d 1288 (3d Cir. 1971). *Accord, e.g., U.S.* v. *DeCamp,* 478 F.2d 1188 (9th Cir. 1973); *Gowdy* v. *U.S.,* 412 F.2d 525 (6th Cir.), *cert. denied,* 396 U.S. 960 (1969); *Market Insurance Co.* v. *U.S.,* 415 F.2d 459 (5th Cir. 1969); *Wright* v. *U.S.,* 382 F.2d 714 (9th Cir. 1967); *Lipka* v. *U.S.,* 369 F.2d 288 (2d Cir. 1966); *Grogan* v. *U.S.,* 341 F.2d 39 (6th Cir. 1965); *United States* v. *Page,* 350 F.2d 28 (10th Cir. 1965), *cert. denied,* 382 U.S. 979 (1966).

B. Inherently Dangerous Activity.

The district court formulated an alternative theory of liability as follows:

> There is another theory of liability, also based on the doctrine of *respondeat superior,* upon which

> responsibility may vest in the United States for the negligence of FEC. Simply stated, the contractee [the Government] is liable where the work performed is inherently dangerous and the contractor's [FEC's] negligence causes injury within the scope of that danger.

Dist. Ct. Op. of Mar. 14, 1975, at 26, Appendix at 32a.

Although the district court made no express reference to §§ 416 and 427 of the Restatement Second of Torts, it is evidence from the New Jersey cases cited by the district court that the court's analysis was predicated on the doctrine which those sections embody.[9] Those section provide:[10]

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[9] Section 427 is "closely related to, and to a considerable extent a duplication of, [the rule] stated in § 416." Rest. 2d Torts, § 427, comment a.

[10] Whether the facts of this case present a situation to which § 416 or § 427 may properly be applied is not at all clear. We are not convinced that a Job Corps center "poses a peculiar risk of physical harm" or is inherently dangerous. Nor are we persuaded that an employee of a contractor, injured by the negligence of that contractor, may recover under the doctrine of §§ 416 and 427. It has been argued that the "inherently dangerous activity" doctrine is limited to third parties such as innocent bystanders or adjacent landowners. *See Gibilterra* v. *Roseman,* 19 N. J. 166, 179-71, 115 A.2d 553, 555 (1953): *Wolczak* v. *National Elec. Products Corp.,* 66 N. J. Super. 64, 75, 168 A.2d 412, 414 (App. Div. 1961); *see also Broechler* v. *Armstrong Cork Co.,* 128 N. J. L. 3, 24 A.2d 194 (E.&A. 1942). *But see Rodrigues* v. *Elizabethtown Gas Co.,* 104 N. J. Super. 436, 444, 250 A.2d 408, 412 (App. Div. 1969) (dictum); *Woolen* v. *Aerojet General Corp.,* 57 Cal. 2d 407, 20 Cal. Rptr. 12, 369 P.2d 708, 711 (1962). Given our disposition of this issue, however, we do not find it necessary to decide these questions.

§416. Work Dangerous in Absence of Special Precautions

> One who employs an independent contractor to do work which the employer should recognize as likely to create during its progress a peculiar risk of physical harm to others unless special precautions are taken, is subject to liability for physical harm caused to them by the failure of the contractor to exercise reasonable care to take such precautions, even though the employer has provided for such precautions in the contract or otherwise.

§427. Negligence as to Danger Inherent in the Work

> One who employs an independent contractor to do work involving a special danger to others which the employer knows or has reason to know to be inherent in or normal to the work, or which he contemplates or has reason to contemplate when making the contract, is subject to liability for physical harm caused to such others by the contractor's failure to take reasonable precautions against such danger.

The "inherently dangerous activity" doctrine of §§ 416 and 427 is an exception to the general rule that one who employs an independent contractor is not liable for the contractor's negligence. *See* Rest. 2d Torts § 409. The doctrine essentially states a theory of vicarious liability, "making the employer liable for the negligence of the independent contractor, irrespective of whether the employer has himself been at fault." Rest. 2d Torts, Introductory Note to Topic 2 [which contains §§ 416 and

427], at 394. The liability imposed under §§ 416 and 427 is thus a form of *respondeat superior*[11] liability, imposed upon a contractee as a result of the negligence of its independent contractor. But the FTCA has limited the liability of the Government to the "negligent or wrongful acts" of its employees. In this context, Government employees do not include the employees of independent contractors. 28 U.S.C. §§ 1346(b) and 2671; *United States* v. *Orleans, supra.* The inquiry then must focus on FEC's status, and, as we have previously pointed out, FEC, which had day-to-day operational control of the Kilmer Center, was perforce an independent contractor. Therefore, under *Orleans,* the Government cannot be held liable for the torts of FEC or its employees. Sections 416 and 427 of the Restatement Second, to the extent they would impose such vicarious liability on the Government, cannot provide the basis for recovery under the FTCA.

Moreover, even if the theory of liability stated in §§ 416 and 427 is construed as absolute liability or a "non-delegable duty" (*see* Rest. 2d Torts, Introductory Note to Topic 2, at 394), and not as vicarious or *respondeat superior* liability, such absolute liability cannot be the basis for recovery in this case. It is clear that the United States may be held liable only for "negligent or wrongful acts", and may not be held liable on any absolute liability theory. *Laird* v. *Nelms,* 406 U.S. 797 (1972) (no strict or absolute liability for ultrahazardous activity); *see Dalehite* v. *United States,* 346 U.S. 15 (1953). "Regardless of state law characterization, the Federal Tort

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[11] Indeed, the Introductory Note cited in the text goes on to state that "the liability imposed is closely analogous to that of a master for the negligence of his servant."

Claims Act itself precludes the imposition of liability if there has been no negligence or other form of "misfeasance or nonfeasance . . . on the part of the Government." *Lard* v. *Nelms, supra,* at 799 (quoting *Dalehite* v. *United States, supra,* at 45).

C. Direct Negligence of the United States.

There remains for consideration the question of the direct negligence of the United States. In his opinion, the district court judge, while carefully identifying the two theories of liability discussed above (*see* Parts II (A) and (B), *supra*), also adverted to "a duty [of the United States] to exercise reasonable care to assure the safety of persons coming into contact with its trainees." Dist. Ct. Op. of Mar. 14, 1975, at 27, Appendix at 33a. While this duty to which the district court opinion refers appears to pertain to the district court's analysis of the "inherently dangerous activity" theory of liability, we do not wish to overlook[12] the possibility that the district

[12] Our difficulty in assessing the direction taken in the district court opinion stems from the district court's language, which speaks to the breach of the Government's duty, in failing to provide for adequate safety precautions, as leading to liability in favor of the plaintiff, "regardless of the fact that it delegated certain functions to FEC, an independent contractor." Dist. Ct. Op. of March 14, 1975, at 27, Appendix 33a. However, despite this statement, the district court's conclusion makes no reference to direct liability, but instead holds that liability is to be found because of ***respondeat superior*** and the presence of an "inherently dangerous activity" (both of which, as we have pointed out, constitute theories of vicarious liability). If the record does support a theory of liability not addressed by the district court, we may nevertheless affirm. *PAAC* v. *Rizzo,* 502 F.2d 306 (3d Cir. 1974). In this case, however, as we observe in the text, the record does not provide a basis on which the district court's conclusion can be sustained on this theory, any more than it can be sustained on the two theories of vicarious liability.

court was advancing still a third theory on which to predicate the Government's liability.

Such a theory would be based on a contention that OEO had notice of a dangerous situation, by virtue of the fact that it knew that many enrollees were drug users, had criminal records, or were otherwise potentially violent, and that it had received reports of disciplinary problems at Kilmer. Because OEO had such knowledge, the argument would continue, it had a duty to the plaintiff, and to others forseeably injured by corpsmen, to take reasonable measures to assure adequate discipline and security. A failure by OEO to provide for adequate security would breach that duty of care, resulting in Government liability. *See McGarry* v. *United States,* 549 F.2d 587 (9th Cir. 1976), *cert. denied* (Oct. 31, 1977); *Thorne* v. *United States,* 479 F.2d 804 (9th Cir. 1973). The crux of this argument would necessarily be OEO's supposed failure, in light of the character of enrollees admitted to the program, to construct or require construction of adequate security facilities, or to give FEC's security officers arrest authority by deputizing them as Deputy U.S. Marshals.[13]

Assuming without deciding that such a theory of liability is a viable one under the FTCA,[14] and that no dis-

[13] Certainly OEO cannot be held to have been negligent for ***selecting and enrolling*** drug users, former criminal offenders, and ghetto youths, since those are precisely the people the program was designed to help. *See* 42 U.S.C. § 2715.

[14] *See McGarry* v. *United States, supra; Thorne* v. *United States, supra. But see Fisher* v. *United States, supra,* and cases cited at p. 7 of this opinion, *supra.*

cretionary function was implicated,[15] nevertheless the record in this case will not support a recovery for Gibson. The factual findings of the district court, rather than showing a breach of duty by the Government, demonstrate that OEO had taken reasonable measures to provide for security at the Kilmer Center.

In brief, the district court found that, while the OEO's Project Manager was aware of a proposal that arrest authority be obtained for FEC's security guards,[16] and that a special isolation facility had been suggested, such a plan had never been submitted by FEC to OEO for approval. Finding of Fact Nos. 14 & 15.[17] Moreover, FEC, which had control of the day-to-day operations at the Center (Finding of Fact No. 6), was required to sub-

[15] *See* 28 U.S.C. § 2680(a). It may well be that any decision with respect to the type of security facilities which should be provided at the Job Corps centers is made at a *planning* rather than an *operational* level. If so, the decision would be pursuant to a discretionary function and excepted from FTCA liability. *See Dalehite* v. *United States, supra,* at 42; *Discoll* v. *United States,* 525 F.2d 136, 138 (9th Cir. 1975). However, we do not pass upon this question.

[16] Moreover, to the extent that the lack of arrest authority was crucial (although it is difficult to ascertain in what way arrest authority would have averted Jessie's attack on Gibson), FEC clearly believed that obtaining such authority was its responsibility. *See* Exhibit P-3 (a letter from FEC's Center Director to the OEO Project Manager, dated April 19, 1966, describing the Center Director's attempt to get special authority for his security officers from local police); Exhibit P-7 (Kilmer Improvement Plan, dated June 22, 1966, prepared by FEC, proposing that arrest authority for guards and a security facility be obtained).

[17] All "Findings of Fact" refer to those contained in the Dist. Ct. Op. of March 14, 1975, at 7-13, Appendix at 13a-20a.

mit a request for the construction of a detention facility or for deputization of its guards if it foresaw the need for these measures. No formal request was ever made by FEC to the Government to provide for either. Findings of Fact No. 16.[18] In addition, although an enrollee could not be discharged from the program without OEO's permission, FEC had the authority to remove physically from the Center any corpsman who caused disciplinary problems.[19] Finding of Fact No. 17. Of added significance is the district court's Finding of Fact No. 18:

> 18) On September 19, 1966, O.E.O. in Washington issued Men's Center Bulletin J/M 67-1 (Exhibit G-1). The bulletin delegated to the Center Directors the power to discharge enrollees for disciplinary reasons and required each Job Corps center to provide an on-site facility for the isolation of corpsmen whose conduct constituted a threat to themselves, other persons, or property. The bulletin, however, was never implemented.

See also Testimony of Mr. Thomas, OEO's Project Manager. Tr. V-148. That same Bulletin also required that each center provide an "on-site facility for the isolation of those Corpsmen whose behavior constitutes a threat to themselves, any other person, or property," Exhibit G-1, at 8, and authorized the use of "physical restraint or isolation to prevent a Corpsman from injuring himself, another person, or property," *id.; see also* testi-

[18] Also, *see* Testimony of Mr. Thomas, OEO's Project Manager, Tr. V-135.

[19] The FEC Center Director also had authority to place enrollees on immediate administrative leave if necessary to safeguard life, property, morale, or safety. Exhibit G-4; Exhibit P-5.

mony of Mr. James, security assistant at Kilmer, Tr. I-92.[20] We note well that OEO's contract with FEC provided that FEC would have the responsibility for taking reasonable precautions to protect the life and health of its personnel (Part XIX of Contract).[21]

From these findings it is clearly evident that the duty to provide adequate security measures devolved not upon the Government, but rather upon FEC. Accordingly, the district court's conclusion that "the Government breached its duty when it failed to provide for adequate safety precautions," Dist. Ct. Op. of Mar. 14, 1975, at 27, Appendix at 33a, finds no support in the record and is inconsistent with the district court's own findings. To the extent, therefore, that the district court opinion may be construed as seeking to premise its holding on a theory of direct governmental negligence, that attempt must fail.

The record reveals that OEO, in light of the supervisory nature of its responsibilities, properly discharged whatever obligation it had to assure adequate security at Kilmer.[22] In sum, it appears that OEO after formulating its policies, made them known to FEC, informed FEC of

[20] The Bulletin also specified that, while Job Corps Headquarters had the responsibility for defining general policy regarding discipline, each Center had the responsibility for developing and enforcing disciplinary rules.

[21] Indeed, FEC had the authority to do all that was needed in this case, *viz,* set aside a room with a strong lock on the door and shatterproof windows. *See* Testimony of Mr. Fogelman, OEO's Contracting Officer, Tr. IV-80.

[22] In general, *see* part I (C) of this opinion, *supra* (discussing security at the Kilmer Center).

its [FEC's] responsibilities, required FEC to take certain basic precautions, and provided FEC with sufficient authorization to do what was necessary in order to perform its functions. Lacking operational control over the activities at Kilmer, the United States cannot be held liable for the lack of proper security facilities at Camp Kilmer.

III.

Conclusion

Because FEC was an independent contractor for the United States, *United States* v. *Orleans, supra,* requires that the district court's two theories of vicarious liability be rejected as bases for liability under the FTCA.[23] Moreover, we conclude on the record before us that the OEO staff members, employees of the United States, were not negligent in carrying out any duty to assure adequate security at the Camp Kilmer Job Corps Center. The United States, therefore, may not be held liable under the FTCA for Gibson's injuries, and the district court's judgment against the United States in favor of Gibson must be reversed. Accordingly the district court will be directed to vacate its judgment of June 15, 1976 and to enter a judgment in favor of the United States. As noted earlier (*see* note 3 *supra*) the entry of a judgment in favor of the United States also disposes of Gibson's appeal as to damages at No. 76-2490, and the said appeal will be dismissed as moot. Each side is to bear their own costs.

To THE CLERK:

Please file the foregoing opinion.

GARTH
Circuit Judge

[23] *See* p. 3 of this opinion, *supra,* noting that *Orleans* was not available to the district court at the time its opinion on liability was rendered.

ADAMS, *Circuit Judge,* concurring in part and dissenting in part.

I concur with Parts A and B of the majority's opinion, which hold that the government is not liable to Ronald Gibson under two different theories of vicarious liability. However, I cannot join Part C of the majority's opinion, where it is concluded, as a matter of law, that there is no evidence in the record of negligence on the part of the government's own employees that would be sufficient to sustain the judgment on behalf of Ronald Gibson. In my view, there is evidence of negligence on the part of the government that does support the judgment of the district court.

A.

As an aspect of the Economic Opportunity Act of 1964, Congress created the Job Corps to assist disadvantaged, low-income youths by establishing urban and rural centers at which such youths, denominated corpsmen, would participate in vocational programs and other activities. On December 1, 1964, a contract was entered into between the Office of Economic Opportunity (OEO), which administered the Job Corp Program, and the Federal Electric Corporation (FEC). Under the contract, the FEC agreed to operate a residential Job Corps training center at Camp Kilmer, a federal reservation in Edison, New Jersey. Pursuant to the agreement, the day-to-day operations of the Camp Kilmer Center were to be the responsibility of the FEC, although the OEO retained broad supervisory authority over the Center.

As the district court found, numerous incidents of enrollee misconduct and fighting occurred at the Kilmer Center subsequent to its opening. Such misbehavior sometimes involved one hundred or more enrollees. In addi-

tion, there were frequent incidents of enrollee intoxication resulting from drugs and alcohol. A number of reports were made to OEO officials regarding the disciplinary problems at the Center. Moreover, OEO authorities were aware that there were enrollees at the Center who had criminal records.

Because of these disciplinary problems, concern was expressed by the guards at the Kilmer Center regarding the lack of a detention facility for unruly corpsmen, and the lack of power to arrest enrollees when circumstances demanded it. There was no such detention facility having special locks or secured rooms at the Center; and the guards were civilians who had no power to arrest anyone. It was thus recommended by the Center to OEO officials that a lock-up be created and that guards be deputized. The request for such changes was never *formally* presented by the FEC to the OEO, but the evidence indicates that the OEO officials were aware of the request.

It was in this setting that the tragic events of November 5, 1966, occurred. On that date plaintiff Ronald Gibson, a group leader at the Center who lived in a dormitory with the corpsmen, heard a violent argument in another section of the dormitory. One of the participants in the argument, Andrew Jessie, was observed to be "belligerent, agressive (sic) and uncontrollable. His eyes were glazed and his speech was incoherent."[1] After separating the adversaries, Gibson returned to his room. About an hour later, there was a further argument involving Jessie. "At this time plaintiff observed that Jes-

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[1] Finding of Fact 24.

sie was talking very loudly and cursing at his antagonist and that his eyes still appeared glazed."[2]

Gibson took Jessie to the duty officer in charge of security, who placed Jessie in a separate dormitory used for unruly corpsmen. This dormitory was physically identical to the others, and "it had no special features or facilities such as bars or special locks appropriate for its function."[3]

After approximately another hour had elapsed, Gibson was informed that Jessie had left the dormitory for unruly corpsmen, and had returned to the regular dormitory. Gibson proceeded to the section of the dormitory where Jessie was creating a new disturbance. After trying to calm down Jessie, Gibson went to the latrine section of the dormitory. There Gibson was stabbed in the temple with a screwdriver held by Jessie, and as a result Gibson suffered the serious injury that is the basis of this tort action.

B.

As the majority properly points out, it is possible to read the district court's opinion in this case as holding that the United States was liable to Gibson on a theory of direct, as distinguished from vicarious, liability. Furthermore, as the majority notes, this Court may affirm the judgment on such a theory even though the district

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[2] Finding of Fact 28.

[3] Finding of Fact 30.

court did not embrace it, so long as there is evidence in the record to support it.[4]

My difference with the majority rests primarily upon our divergent interpretation of the factual record in this case. The record, as I view it, does support the theory that the United States itself breached a duty of care to Gibson.[5]

The duty of care as to which the direct negligence of the United States may be found to have occurred requires that the government ". . . exercise reasonable care to see that the contractor takes proper precautions to protect those who might sustain injury from the work." *McGarry* v. *United States,* 549 F.2d 587, 590 (9th Cir. 1976). See *Thorne* v. *United States,* 479 F.2d 804 (9th Cir. 1973). This duty arises when the activity engaged in by the contractor over whom the employer has supervisory control, is dangerous.[6] The liability arising from the breach of

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[4] This Court has written that "(i)t is proper for an appellate court to affirm a *correct* decision of a lower court even when that decision is based on an inappropriate ground." *PAAC* v. *Rizzo,* 502 F.2d 306, 308 n.1 (3d Cir. 1974) (emphasis in original).

[5] *United States* v. *Orleans,* 425 U.S. 807 (1976), which the majority relies upon in rejecting the theory of the government's *vicarious liability,* has nothing to do with the theory of the government's *direct negligence* in this case.

[6] Restatement, Second, Torts §414 provides that:

> One who entrusts work to an independent contractor, but who retains the control of any part of the work, is subject to liability for physical harm to others for whose safety the em-

(Footnote continued on following page)

such a duty, as *McGarry* pointed out, is neither strict nor vicarious.

In *McGarry,* the court held that the Atomic Energy Commission owed a duty of care to the employees of an

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(Footnote continued from preceding page)

ployer owes a duty to exercise reasonable care, which is caused by his failure to exercise his control with reasonable care.

Comment (a) pertaining to that section stresses that one who retains "supervisory control" over the activities of the contractor may be liable under the section "unless he exercises his supervisory control with reasonable care so as to prevent the work which he has ordered to be done from causing injury to others." Comment (b) underscores the point that liability may arise when the work engaged in by the contractor is "unreasonably dangerous" to others.

New Jersey courts have adopted §414 of the Restatement. *See, e.g., Berquist* v. *Penterman,* 46 N. J. Super. 74, 134 A.2d 20, 26, certification denied, 134 A.2d 832 (1957). *Cf. Marion* v. *Public Service Elec. & Gas Co.,* 72 N. J. Super. 146, 178 A.2d 57, 62 (1962).

It might be argued that, in this case, the extent of the OEO's control over the operations at Camp Kilmer was insufficient to bring into play §414 of the Restatement. However, Comment (c) of §414 makes clear that day-to-day operational control by the party sought to be charged is not required. It provides that there must be more than "a general right to order the work stopped or resumed, to inspect its progress or to receive reports, to make suggestions or recommendations which need not necessarily be followed, or to prescribe alterations and deviations." Nevertheless, the requisite supervisory control "does not mean that the contractor is controlled as to his methods of work, or as to operative detail." In this case, there are findings that the OEO was responsible for approving the extension of physical security at the Center, and that the OEO maintained a permanent representative at the Center to report to Washington, D. C. Thus, although the "operative detail" of the Center's activities was not determined by the OEO, the OEO retained a broad supervisory and operational authority for activities carried on at the Center.

independent contractor—hired to manage, operate and maintain the Nevada Test Site—in order to make sure that the employer was taking proper precautions regarding the hazards of work near a power line at the site. The *McGarry* Court stressed that its holding did not require that the AEC place an onsite inspector in the vicinity of all work on the power line in question. Rather, it wrote:

> If, here, the AEC had made regular examinations to ascertain the practices being followed by REECO (the contractor), and was reasonably satisfied from its examinations that appropriate guidelines were being followed, this might well have been found by the trier of fact to suffice. No such examination was conducted here and the district court found that *the AEC had failed to exercise reasonable or any care to see that proper safety precautions were taken by REECO* with reference to work performed in the neighborhood of the power line.[7] (emphasis added)

Liability of the government for a breach of the duty of care articulated in *McGarry* is not foreclosed by a claim of sovereign immunity. For the Federal Torts Claims Act (FTCA) waives sovereign immunity for the "negli-

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[7] 549 F.2d at 590-591. Although *McGarry* noted that the district court had found that the AEC did "nothing" to determine whether the contractor was fulfilling its contractual obligations to provide safely for the employees, 549 F.2d at 590-91, its holding did not turn on this fact. There is no indication in *McGarry* that for the government to be liable for direct negligence, it is necessary to show that nothing at all has been done by the government regarding the risk in question.

gent and wrongful act or omission of any employee of the Government," 28 U.S.C. § 1346(b). Thus, the critical question here is whether there is evidence regarding a breach by government employees of the relevant duty of care.

An analysis of this issue must rest, of course, primarily on the findings of the district court. The district court found that the OEO's project manager for the Job Corps, based in Washington, D.C., was responsible for approving numerous aspects of the Center's operations, including the extension of physical security at Camp Kilmer.[8] OEO was also found to have maintained a permanent "on site" representative at the Center to report to Washington, each week, all problems such as those relating to security.[9]

Moreover, the district court ascertained that incidents of enrollee misconduct were "routinely" reported to the federal officials responsible for the Job Corps program.[10] It further found that the selection of enrollees was solely the responsibility of the OEO, and that sometime after July of 1965, an apprehension was expressed to the OEO that the Center was getting "too large a proportion of enrollees who were disciplinary problems."[11]

Prior to November 5, 1966, when the assault on Ronald Gibson occurred, the trial court noted that there had been many incidents of misbehavior by corpsmen, "including

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[8] *See* Finding of Fact 7.

[9] *See* Finding of Fact 11.

[10] Finding of Fact 5.

[11] Finding of Fact 10.

fights sometimes involving 100 or more enrollees, and intoxication due to alcohol and drugs."[12] Security personnel had conveyed their concern over the possibility of a riot at the Center. In addition, prior to November of 1966, OEO officials received "frequent reports of disciplinary problems at Camp Kilmer," and at least one OEO official "was aware that a narcotics addiction problem existed at the center."[13]

The district court made a number of findings regarding the lack at the Center of a detention facility for unruly corpsmen. It found that a document containing proposals that a special detention center be created for emergencies, and for the provision of some form of arrest authority by the Center's security guards, was prepared by the Kilmer Center staff prior to November of 1966, and that, even though it was never officially submitted to the OEO project manager for the Jobs Corps, the project manager was aware of the plan.[14] Also, the court noted that on numerous occasions the security assistant at the Center "had discussions with OEO's on site representative about the need for a detention facility and for the deputization of security guards."[15] As the district court determined, the Center's security personnel were "civilian employees of FEC who were not empowered to make arrests, or to carry weapons."[16] Nevertheless, the OEO never required

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[12] Finding of Fact 12.

[13] Finding of Fact 13.

[14] *See* Finding of Fact 14.

[15] Finding of Fact 15.

[16] Finding of Fact 9.

the FEC to construct such a facility or to seek arrest authority for its guards.[17]

These findings, taken together, support the propositions that (1) the OEO had notice of a dangerous situation at the Center, (2) the OEO had notice of concern on the part of the Center staff regarding the lack of a secure detention facility and of a form of arrest power on the part of the guards, (3) the OEO had notice of a plan for such changes, and (4) the OEO did not take any steps to see that these deficiences were corrected so as to provide protection of the FEC employees, including Ronald Gibson. On these facts, it is reasonable to conclude that employees of the government breached a duty to take reasonable measures to guarantee that adequate security was maintained at the Center, and that one of the Center's employees was injured as a result of a foreseeable risk stemming from such a breach.

Yet, the majority rejects the theory of the government's negligence substantially on the ground that a *formal* plan for the construction of a detention facility and for the deputization of the Center's guards was never submitted by the FEC to the OEO.[18] This position would appear to overlook the fact that the project manager of the Jobs Corps was found by the district court to have been aware of the existence of a plan formulated by the Center staff that proposed these changes. To take a trial court verdict from a plaintiff critically and tragically injured on the basis of a lack of a formal request by the FEC to the OEO for increased security at the Center

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[17] Finding of Fact 16.

[18] *See* majority's opinion at pp. 13-14.

would seem to ignore the basic duty of the government at issue in this case, and also, as a practical matter, to put an undue emphasis on the form of the notice received by the OEO regarding the need for such precautions.[19]

Moreover, the proposition, cited by the majority that the contract between the FEC and the OEO provided that the FEC would have the responsibility to take precautions to protect its personnel[20] is not dispositive of this case. Unless the majority is suggesting that the government can contract out of its duty of care to the employees of its contractors in circumstances such as those here—a doubtful result for which no authority is supplied—then I see no sense in which the terms of the contract may be viewed as central to this tort action. What *is* crucial here, in my view, is the evidence bearing upon the duty of the government to take reasonable precautions to assure the safety of employees like Gibson, and the breach of that duty.

In addition, the fact that the district court found that, in September of 1966, the OEO issued a bulletin requiring all Job Corps centers in the country to "provide an on-site facility for the isolation of corpsmen whose conduct constituted a threat to themselves, other persons, or property"[21]—which, says the majority, assumes "added sig-

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[19] This is not to suggest that the FEC did not have a duty to take safety precautions. However, the point stressed by the majority that the FEC had a duty does not mean that government employees did not also have a duty of care in the circumstances of this case.

[20] *See* majority's opinion at p. 15.

[21] *See* Finding of Fact 18.

nificance" in this case—is not at all dispositive. First, the bulletin was evidently a general one addressed to all Job Corps centers, and was not in response to the particular problems associated with the Kilmer Center. Moreover, requiring that there be an "isolation" facility for unruly corpsmen is not the same as requiring the construction of a *detention* facility that would function as a lock-up in which to restrain violent enrollees. Indeed, Gibson's assailant, Jessie, was himself placed in an isolation facility, a dormitory room separate from the living and working quarters of the Center, after Gibson removed him from his own dormitory. However, because the isolation facility was not secure, and thus did not detain him, Jessie soon returned to his own dormitory. Thus, even with an isolation facility at the Center, 'he injury that it is the subject of this action was not averted.

C.

Given that the facts support the conclusion that a duty to provide adequate security measures, which devolved upon the government, was breached in this case, it is necessary to consider whether the duty in question entails a "discretionary function." 28 U.S.C. §2680(a) provides that the FTCA does not permit a claim "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." As the court in *Driscoll* v. *United States,* 525 F.2d 136, 138 (9th Cir. 1975) wrote, ". . . the discretionary function exception is limited to decisions made at the *planning* rather than the *operational* level." (emphasis in original)

The argument that the provision of a secure detention facility and of arrest power for the guards at the Center was a discretionary function rests on the premise that the OEO delegated the complete operational control of such matters to the FEC, and retained only a broad planning authority with respect to safety aspects at the Center. Yet, the findings by the trial court do not support such an assumption.

As the district court found, the OEO maintained close supervision over the Center, having an on-site representative there who was responsible for reporting weekly to officials in Washington, D.C., about matters such as security. Moreover, "(n)umerous aspects of the Center's operation, including the extension of physical security, were subject to . . . approval" of the OEO project manager in Washington, D.C.[22] The fact that the OEO had to approve security measures implemented by the Center clearly does not establish that all operational questions were delegated to the Center. Indeed, the requirement of OEO approval of Security measures supports the view that the government was involved at more than a broad planning level in overseeing the safety of conditions at the Center.

As in *McGarry, supra,* the government here "chose to retain some responsibility over matters of employee safety."[23] In light of the facts of this case, it would be reasonable to conclude that the fulfillment of those responsibilities was an "operational function." A holding that the government is liable for negligence is thus not

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[22] Finding of Fact 7.

[23] 549 F.2d at 591.

barred by the "discretionary function" exception of the FTCA.

D.

On the basis of the findings of fact by the trial court, which have not been attacked as clearly erroneous, I would hold that the conclusion that there has been a breach of the duty of care owed by the government's employees is not an unreasonable one. Consequently, I would affirm the judgment of the district court regarding the liability of the government.[24]

[24] Since the majority's disposition of the question of liability in this case renders it unnecessary to discuss Gibson's cross appeal on the issue of damages, I decline to do so, except to say that I would remand that portion of the case dealing with damages to take into account any injuries resulting from Gibson's alleged inability to attain a doctoral degree after the attack in question.

APPENDIX B

Judgments of the United States Court of Appeals for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 76-2673

RONALD GIBSON

vs.

UNITED STATES OF AMERICA,

Appellant.

(D. C. Civil No. 1147-68)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Present:

ADAMS and GARTH, *Circuit Judges* and LAYTON, *District Judge**

* The Honorable Caleb R. Layton, 3rd, United States District Court for the District of Delaware, sitting by designation.

Appendix B

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel on October 17, 1977.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, dated June 15, 1976, be, and the same is hereby reversed, and the district court is directed to vacate its judgment of June 15, 1976 and to enter a judgment in favor of the United States. Each side is to bear their own costs.

ATTEST:

THOMAS P. QUINN
Clerk

December 15, 1977

Appendix B

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 76-2490

RONALD GIBSON,

Appellant

vs.

UNITED STATES OF AMERICA,

(D. C. Civil No. 1147-68)

Present:

ADAMS and GARTH, *Circuit Judges* and LAYTON, *District Judge**

It is ORDERED that the appeal at No. 76-2490 be and hereby is dismissed as moot, in accordance with the opinion of this Court filed this date. Each side is to bear their own costs.

Attest:

THOMAS P. QUINN
Clerk

Dated: December 15, 1977

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* The Honorable Caleb R. Layton, 3rd, United States District Court for the District of Delaware, sitting by designation.

APPENDIX C

Order Denying Petition for Rehearing of the United States Court of Appeals for the Third Circuit

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 76-2490
76-2673

RONALD GIBSON,

Plaintiff-Appellee and
Cross-Appellant,

v.

UNITED STATES OF AMERICA,

Defendant-Appellant and
Cross-Appellee

SUR PETITION FOR REHEARING

Present:

SEITZ, *Chief Judge*, ALDISERT, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, *Circuit Judges* LAYTON, *District Judge*

The petition for rehearing filed by RONALD GIBSON in the above entitled case having been submitted to the

Appendix C

judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied. Judge Rosenn would grant the petition for rehearing.

By the Court,

GARTH
Judge

Dated: February 1, 1978

APPENDIX D

Opinion of the United States District Court for the District of New Jersey

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

CIVIL ACTION No. 1147-68

RONALD GIBSON,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

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Appendix D

WHIPPLE, Chief Judge

Plaintiff brings this action against the United States under the Federal Tort Claims Act, for personal injuries inflicted as a result of the negligence and omissions of Government employees. This Court originally dismissed the complaint for lack of subject matter jurisdiction, relying on 28 U.S.C. Sec. 2680(h). On appeal, however, the Third Circuit held that subject matter jurisdiction did exist, and the case was remanded for further proceedings. *Gibson* v. *United States,* 457 F.2d 1391 (3d Cir. 1972).

Trial in this cause, on the issue of liability alone, was commenced on October 30, 1974, and concluded on November 12, 1974. At that time this Court reserved decision pending the resolution of certain evidentiary objections and the submission of proposed findings of fact by the parties.

I.

During the course of the trial, plaintiff attempted to place in evidence certain documents (P-2 through P-8) on the ground that they were admissible as business records pursuant to 28 U.S.C. Sec. 1732. The defendant objected and the Court allowed the documents to be admitted, subject to their being stricken if plaintiff failed to establish a proper foundation during the course of the proceedings. (T. Oct. 30, 1974, p. 18 Thorne). Before rendering findings of fact and law it is of course necessary that this Court determine the admissibility of the disputed evidence.

Plaintiff has sought the admission of the documents under 28 U.S.C. Sec. 1732, the so-called Business Records Act, which provides that:

Appendix D

(a) In any court of the United States * * *, any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event shall be admissible as evidence of such * * *, if made in regular course of any business, and if it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter.

All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but such circumstances shall not affect its admissibility.

The purposes of this section are 1) to create an exception to the hearsay rule, 2) to provide an acceptable substitute for specific authorization of each business record, and 3) to facilitate admission of the records themselves as evidence. *Hagans* v. *Ellerman & Bucknall S.S. Co.*, 318 F.2d 563 (3d Cir. 1963); *United States* v. *Olivo*, 278 F.2d 415 (3d Cir. 1960). Since experience has shown that business records are generally reliable and trustworthy, this section is designed to reflect the realities of business and professional practice. *Gray* v. *L. J. Navy Trucking Co.*, 475 F.2d 545 (6th Cir. 1973); *Central R.R. of N. J.* v. *Jules S. Sottnek Co.*, 258 F.2d 85 (2d Cir. 1958).

The Business Records Act, however, was not intended to eliminate the requirement that a record, to be admissible, must carry with it some guarantee of trustworthiness. *United States* v. *Grow*, 394 F.2d 182 (4th Cir. 1968); *Bowman* v. *Kaufman*, 387 F.2d 582 (2d Cir. 1967);

Appendix D

Hartzog v. *United States*, 217 F.2d 706 (4th Cir. 1954). To this end, Section 1732 establishes as a requirement for admissibility that documents must have been prepared in the regular course of business. As courts have defined this term, such records must have been kept pursuant to some routine procedure designed to assure their accuracy, they must have been created for motives that would tend to assure accuracy, and they must not themselves be mere cumulations of hearsay or uninformed opinion. *Sabatino* v. *Curtiss Nat'l Bank*, 415 F.2d 632 (5th Cir. 1969), *cert. denied*, 396 U.S. 1057. As the Third Circuit stated in *Hagans* v. *Ellerman & Bucknall S.S. Co.*, 318 F.2d 563, 576 (3d Cir. 1963):

> "* * * [*T*]*he admissibility of evidence under the Official Records Act* [28 *U.S.C. Sec.* 1732] *is not established merely because the material sought to be introduced has been taken from a business file.* A foundation must be laid to establish that the memoranda sought to be introduced were made in the regular course of business. * * *" *Bisno* v. *United States*, 299 F.2d 711, 718 (9th Cir. 1961), *cert. denied*, 370 U.S. 952, 82 S.Ct. 1602, 8 L. Ed. 2d 818 (1962).

And in the leading case of *Palmer* v. *Hoffman*, 318 U.S. 109, 63 S.Ct. 477, 87 L. Ed. 645 (1943) the Court in interpreting the historic aims of that Act, said:

> "* * * But *'regular course' of business must find its meaning in the inherent nature of the business in question and in the methods systematically employed for the conduct of the business as a business.'* 318 U.S. at 115, 63 S.Ct. at 481.

The Court also stated:

> "• • • *Nor is it any answer to say that Congress has provided in the Act that the various circumstances of the making of the record should affect its weight,* not its admissibility. *That provision comes into play only in case the other requirements of the Act are met.*" 318 U.S. at 114, 63 S.Ct. at 481.
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> See also Standard Oil Co. of Calif v. Moore, 251 F.2d 188, 215, n. 34 (9th Cir. 1958); Masterson v. Pennsylvania R. Co., 182 F.2d 793 (3 Cir. 1950) and Gordon v. Robinson, 210 F.2d 192, 197-198 (3 Cir. 1954).

(emphasis added). In *Hagans,* the Court held that the evidence there in question was not a business record since no testimony was adduced to show that the document was of a type systematically made and kept in the course of defendant's business. 318 F.2d at 575-77. Merely because records are business records, therefore, does not render them admissible under the statute.

It is incumbent upon the party who seeks to introduce documents or writings as business records to prove that there is a systematic or routine procedure being followed—by the business in the course of its business—in the preparation, filing and storage or retention of such writings. *Standard Oil Co.* v. *Moore,* 251 F.2d 188 (9th Cir. 1957), *cert. denied,* 356 U.S. 975 (1958). The person testifying as to the accuracy of the records must be in a position to attest to their authenticity. *United States* v. *Dawson,* 400 F.2d 194 (2d Cir. 1968), *cer. denied,* 393 U.S. 1023 (1969).

One of the witnesses upon whom plaintiff relied to establish the admissibility of the documents was Mr. Alfred W. Thorn, Federal Electric Company's (F.E.C.) manager of plant services. Although Mr. Thorn testified that he is in effect F.E.C.'s record custodian, his testimony revealed that he was not in a position to attest to the authenticity of the exhibits in question. Thorn gave no testimony which established the recordmaking procedures of F.E.C., or the circumstances surrounding the particular records at issue. He could not even confirm that these records were made at or near the time of the condition or event recorded.

The shortcomings of Mr. Thorn's testimony notwithstanding, I have examined each of the disputed exhibits in an attempt to determine its admissibility. P-3 is a carbon of a letter sent to Mr. Carol Thomas, the project manager of the Men's Center Division of the Job Corps. No proof was adduced, however, as to the mailing of the original letters and the retention of file copies. The mere presence of a copy of a letter in the file is insufficient to prove the trustworthiness of the document. *Marcus* v. *United States,* 422 F.2d 752 (5th Cir. 1970). P-3 is therefore inadmissible.

P-4 is a letter from the Office of Economic Opportunity (O.E.O.) to the Mayors of both Piscataway and Edison, New Jersey. P-8 appears to be a Telex from O.E.O. to F.E.C. It is clear that documents must be shown to have been made in the regular course of business of the company in whose files they are found before the Business Records Act applies. *Phillips* v. *United States,* 356 F.2d 297 (9th Cir. 1965). Since these documents were not even prepared by F.E.C., such exhibits are inadmissible.

Joseph F. Zimmer was F.E.C.'s manager of contract administration. His testimony is sufficient to allow the admission of certain of the disputed exhibits.

P-2 is a summary of the contract between O.E.O. and F.E.C. Mr. Zimmer testified that he prepared this document himself. In view of the witness' duties at F.E.C. it is clear to the Court that there exists a sufficient showing of the document's reliability to allow its admission into evidence.

Zimmer also testified that he supervised the preparation of P-7 at the request of O.E.O.'s contracting officer. The testimony concerning the preparation of this document is sufficient to qualify it as a business record and it will remain in evidence.

P-5 and P-6 are purportedly F.E.C. inter-office memoranda. Although Zimmer testified that he recognized the signatures or initials of the F.E.C. officials who allegedly prepared those documents, this testimony is insufficient to establish their reliability and thus qualify them as business records. Lacking a proper foundation, these exhibits will be stricken from the record.

II. Findings of Fact

1) As part of the Economic Opportunity Act of 1964 Congress established the Job Corps for the purpose of assisting low-income, disadvantaged young people by establising rural and urban centers in which enrollees would participate in programs of education, vocational training, work experience and other activities. 42 U.S.C. Sec. 2711 (now 29 U.S.C. Sec. 911).

2) By virtue of 42 U.S.C. Sec. 2714, the Director of the Office of Economic Opportunity was authorized to prescribe rules for the screening and selection of applicants for enrollment in the Job Corps; 42 U.S.C. Sec. 2715 provided that no individual was to be selected as an enrollee unless it was determined that "he is not likely to engage in actions or behavior that would prevent other enrollees from receiving the benefit of the program or be incompatible with the maintenance of sound discipline. . . ." Section 2720 provided that "within the Job Corps centers, standards of conduct and deportment shall be provided and stringently enforced."

3) On December 1, 1964, a contract was entered into between the O.E.O. and the Federal Electric Corporation (F.E.C.) by which F.E.C. agreed to operate a Job Corps residential training center for boys at Camp Kilmer, Edison, New Jersey.

4) Relevant portions of the contract appear in appendix A of this Opinion.

5) Camp Kilmer was a Federal Reservation under the jurisdiction of the United States Government. Liaison was maintained between the Kilmer Center staff, the F.B.I. and the Office of the United States Attorney. Incidents of enrollee misconduct were routinely reported to federal authorities.

6) Although O.E.O. had broad supervisory authority over the Camp Kilmer Job Corps Center, control over the Center's day-to-day operations resided in F.E.C.

7) Carol Thomas, O.E.O.'s project manager for the Job Corps, was based in Washington, D.C. Numerous aspects

of the Center's operation, including the extension of physical security, were subject to his approval.

8) Guidelines for the control of corpsmen's conduct were disseminated by O.E.O. Pursuant to these guidelines, F.E.C.'s center personnel implemented specific rules and regulations.

9) O.E.O. also had the responsibility to approve center staffing. On November 5-6, 1966, there were approximately 1,000 corpsmen at the Kilmer Center. There were four or five guards per shift in addition to two investigators. The security personnel were civilian employees of F.E.C. who were not empowered to make arrests, or to carry weapons.

10) O.E.O., alone, was responsible for selecting the enrollees to be sent to the Kilmer Center. Sometime after July of 1965, F.E.C. expressed concern to O.E.O. over whether they were getting too large a proportion of enrollees who were disciplinary problems.

11) In pursuance of its supervisory role, O.E.O. maintained a permanent "site representative" at the Kilmer Center whose function it was to report problems encountered there to Washington on a weekly basis. In addition, numerous on-site inspections were conducted by other federal employees.

12) Subsequent to the opening of the Kilmer Center and prior to November 1966, there were numerous incidents of corpsmen's misbehavior, including fights sometimes involving 100 or more enrollees, and intoxication due to alcohol and drugs. Security personnel were concerned over the possibility of a riot but managed to contain all incidents before general riots developed.

13) Prior to November 1966, O.E.O. officials, including Carol Thomas and Milton Fogelman, O.E.O.'s Contracting Officer, received frequent reports of disciplinary problems at Camp Kilmer. In addition O.E.O. officials were aware that there were enrollees at the Kilmer Center with criminal records. At least one O.E.O. official, Carol Thomas, was aware that a narcotics addiction problem existed at the Center. F.E.C. did not request assistance in coping with the narcotics problem, and O.E.O. did not consider combatting the problem to be the Government's responsibility.

14) Exhibit P-7, a document entitled Kilmer Improvement Plan, was prepared prior to November 1966, by the Kilmer Center Staff. It contains proposals that some form of arrest authority be obtained for its security guards, and that a special isolation facility be provided for the detention of corpsmen in emergency cases. Although Carol Thomas was aware of the plan, it was never officially submitted to him for approval.

15) On numerous occasions, Willie James, the security assistant at Camp Kilmer Center, had discussions with O.E.O's on site representative about the need for a detention facility and for the deputization of security guards.

16) F.E.C. would have been required to submit a request to O.E.O. for the construction of a detention facility or for deputization of its guards. No formal request was ever made by F.E.C. to Carol Thomas, O.E.O.'s Camp Kilmer Project Manager, nor did O.E.O. ever require F.E.C. to construct such a facility or to seek arrest authority for its guards.

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17) F.E.C. had the authority to physically remove from the Center any corpsmen causing disciplinary problems but an enrollee could not be discharged from the Job Corps program without the permission of O.E.O.

18) On September 19, 1966, O.E.O. in Washington issued Men's Center Bulletin J/M 67-1 (Exhibit G-1). The bulletin delegated to the Center Directors the power to discharge enrollees for disciplinary reasons and required each Job Corps center to provide an on-site facility for the isolation of corpsmen whose conduct constituted a threat to themselves, other persons, or property. The bulletin, however, was never implemented.

19) In November, 1964, plaintiff Ronald C. Gibson was hired by F.E.C. as a group leader.

20) As a group leader, Gibson lived in the dormitories with the corpsmen and had daily group meetings with the corpsmen assigned to him.

21) In October, 1966, plaintiff was assigned to dormitory No. 2127 and as of November 5, 1966 he had not become fully familiar with the enrollees in that dormitory. In Gibson's words, "There was a lot of havoc in that dormitory."

22) On November 5, 1966, at 8:00 p.m., plaintiff was in his room in dormitory No. 2127, which was divided into sections A and B.

23) Plaintiff heard an argument taking place in the living quarters of the dormitory and proceeded there in his capacity as a group leader. He observed three corps-

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men arguing violently, one of whom was Andrew Jessie. Other corpsmen were also present.

24) Plaintiff observed that Jessie appeared belligerent, aggressive and uncontrollable. His eyes were glazed and his speech was incoherent.

25) Jessie lived in the A section and his corpsmen antoganists were from the B section. Plaintiff separated the adversaries and told Jessie to return to the A section of the dormitory.

26) Jessie left pursuant to plaintiff's instruction and plaintiff returned to his room.

27) About an hour later, plaintiff heard a loud controversy taking place in one of the rooms of B section. Plaintiff went to the scene of the ruckus and found Andrew Jessie again arguing with a corpsman. At this time plaintiff observed that Jessie was talking very loudly and cursing at his antagonist and that his eyes still appeared glazed. Plaintiff separated Jessie from the other corpsman and took Jessie to plaintiff's room.

29) Plaintiff then took Jessie to the duty officer in dormitory No. 2113 who was in charge of security for the corpsmen at that time.

30) Plaintiff and the duty officer agreed that Jessie presented a problem in his own dormitory (No. 2127) and should be placed in dormitory No. 2132. Dormitory No. 2132 was the so-called security dormitory used for corpsmen who were creating problems. Its physical layout was identical to the other dormitories and it had no special

features or facilities such as bars or special locks appropriate for its function.

31) Plaintiff did not know whether or not dormitory No. 2132 was sufficient to restrain Jessie or whether the duty officer actually took Jessie to No. 2132. He did not give any special instructions to the duty officer believing that Jessie was no longer his responsibility.

32) Approximately an hour later (between 10:00 p.m. and 11:00 p.m.) a corpsman from the A section of plaintiff's dorm informed plaintiff that Jessie had returned to that section.

33) Plaintiff went to the A section and observed a number of corpsmen, including Jessie, arguing and creating a disturbance. The duty officer as well as other security people were also present.

34) Plaintiff requested that the security personnel leave the room and remain outside while he tried to calm the situation with the help of other corpsmen.

35) Plaintiff noticed that Jessie was very excited and requested that two corpsmen attempt to calm him down and help return him to dormitory No. 2132.

36) Plaintiff then went to the latrine section, located between sections A and B. Hearing somebody behind him, he turned and was stabbed in the temple with a screwdriver by Jessie.

37) Plaintiff wrestled with Jessie until two corpsmen entered the latrine and separated the combatants. Plaintiff again requested the two corpsmen to calm Jessie down, and he then proceeded to the dispensary. He did not instruct the corpsmen to return Jessie to the isolation facility.

38) At the dispensary, plaintiff had his wound treated and was instructed by the medical aide to go to the hospital. Plaintiff explained to the aide that he would first return to the dormitory and check on the situation there. He did not inform security of the stabbing incident nor request the medical attendant to do so.

39) After leaving the dispensary, plaintiff returned to his dormitory where he was met outside by Jessie who slashed him in the back with a razor. Security officers arrived at this point and restrained Jessie.

40) At 3:00 a.m. on the morning of November 6, 1966, Gaddis Johnson, an investigator for Camp Kilmer Security Department, saw Andrew Jessie for the first time. Jessie was in the custody of two law enforcement officers and was shouting obscenities. His speech was slurred and incoherent.

41) Pursuant to 42 U.S.C. Sec. 2727(a)(3), for purposes of the Federal Tort Claims provisions of Title 28, enrollees are considered employees of the United States Government.

Conclusions of Law

The plaintiff contends that since the United States Government affirmatively undertook a training program for young people with behavioral problems, it had a duty to

exercise reasonable care by providing safety measures for the protection of instructors required to live and work with such trainees. Before determining the validity of plaintiff's assertion, this Court must first decide whether the immunity provisions of the Tort Claims Act are applicable.

The Federal Tort Claims Act, 28 U.S.C. Sec. 1346(b), is designed to afford a judicial remedy for those who suffer injury or damage as a result of the negligence or misconduct of a United States employee. It provides in pertinent part:

> [T]he district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for . . . personal injury . . . caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, ...

However, this provision is limited by 28 U.S.C. Sec. 2680 (h) which states that the provisions of the Tort Claims Act shall not apply to "[a]ny claim arising out of *assault* [or] *battery*. . . ." (emphasis added).

Section 2680(h) has been held to exempt the United States from liability for assaults or batteries committed by Government employees, but not from liability resulting from the commission of those intentional torts by a third party which the Government negligently failed to prevent. *See Rogers* v. *United States,* 397 F.2d 12 (4th Cir. 1968); *Underwood* v. *United States,* 356 F.2d 92 (5th Cir. 1966); *Muniz* v. *United States,* 305 F.2d 285, 287 (2d Cir. 1962), *aff'd, United States* v. *Muniz,* 374 U.S. 150 (1963); *Moos* v. *United States,* 225 F.2d 705 (8th Cir. 1955), *aff'g,* 118

F. Supp. 275 (D. Minn. 1954); *Panella* v. *United States,* 216 F.2d 622 (2d Cir. 1954), *rev'g. in part, United States* v. *Wilcox,* 117 F. Supp. 119 (S.D. N.Y. 1953); *Collins* v. *United States,* 259 F. Supp. 363 (E.D. Pa. 1966). This Court is unaware of any case in which recovery has been allowed against the United States for an assault or battery committed by one of its employees.

The Third Circuit, however, in *Gibson* v. *United States,* 457 F.2d 1391 (3d Cir. 1972), has indicated that the facts as pleaded in this case may require an exception to that rule. This Court, when it originally confronted this case, dismissed the complaint for lack of jurisdiction pursuant to section 2680(h). The Third Circuit disagreed for two reasons.

> First, the attack upon Gibson was a foreseeable consequence of the Government's failure to exercise due care *under the circumstances* and, therefore, it *is not such an intervening act as will sever the necessary causal relation between the negligence and the appellant's injuries.*
>
> Here the very risk which constitutes the defendant's negligence is the probability of such action. It is clear that when such action occurs, it should not insulate the defendant's negligence under the causation formula. In other words, it is clearly unsound to afford immunity to a negligent defendant because the intervening force, the very anticipation of which made his conduct negligent, has brought about the expected harm.

Under the appellant's allegations, the injury arose out of the basic negligence of the United States and the attack was the foreseeable conse-

> quence of the original misconduct. "That the foreseeable danger was from intentional or criminal misconduct is irrelevant; respondent nonetheless had a duty to make reasonable provision against it. *Breach of that duty would be negligence. . . .*" (emphasis supplied) *Lillie* v. *Thompson,* 332 U.S. 459, 462 (1947); *Harrison* v. *Missouri Pacific R. Co.,* 372 U.S. 248 (1962). Under such circumstances, the attack was not an intervening act and the tort did not arise out of the assault and battery. It had its roots in the Government's negligence.

457 F.2d at 1395 (footnote omitted) (quoting from Harper and Kime, *The Duty to Control the Conduct of Another,* 43 Yale L.J. 886, 898 (1934)). This rationale has previously been used and accepted only in cases involving claims arising out of assaults by non-government employees. *See Panella* v. *United States, supra; Muniz* v. *United States, supra.* It has constantly been rejected when the assaulting party was an employee of the United States since the cause of action was deemed to have arisen out of the assault or battery. *See Moos* v. *United States,* 225 F.2d 705 (8th Cir. 1955), *aff'g,* 118 F. Supp. 275 (D. Minn. 1954); *Collins* v. *United States,* 259 F. Supp. 363 (E.D. Pa. 1966).

In *Collins* v. *United States, supra,* the plaintiff after being "pushed, hit and struck" by a postal employee alleged that the Government was negligent in hiring and retaining an employee who it knew or should have known possessed "violent, vicious and malicious propensities." The Government moved to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) and relied on section 2680(h).

The plaintiff argued that his claim was not founded upon assault and battery, but rather upon the negligence of the Government. Judge Lord, noting the lack of applicable case law or helpful legislative history, stated:

> We are left, then, with the words of the Act as our only guide. It is true that the claim here is predicated on negligence. However, that negligence would have been without legal significance absent the alleged act of Brosz. Without that, there would have been no actionable negligenge. It was the attack which served to attach legal consequences to defendant's alleged negligence. Congress could easily have excepted claims *for* assault. It did not; it used the broader language excepting claims *arising out of* assault. It is plain that the claim arose only because of the assault and battery, and equally plain that it is a claim arising out of the assault and battery. This being so, the United States has not waived its immunity as respects this claim.

259 F. Supp. at 364. The Court then referred to *Panella* v. *United States, supra,* as lending "inferential support" to its decision. *Panella* involved a claim by a convicted drug addict who, in lieu of a custodial sentence, elected to undergo treatment for his addiction at a United States maintained and controlled hospital. While an inmate at that institution, he was allegedly assaulted by another inmate. He sued the United States claiming that the employees of the Government were negligent in failing to provide adequate guards and supervision. The district court granted defendant's motion for summary judgment. The United States Court of Appeals for the Second Circuit reversed on the sole ground that the exception in sec-

tion 2680 (h) did not apply to assaults by non-government employees. Given that background, the Court in *Collins* stated:

> The plain implication of *Panella* is that had the assault been by a government employee, the action would have been barred even though it was predicated on an allegation of negligence other than the assault itself.

259 F. Supp. at 364.

When this Court originally dismissed the plaintiff's complaint, reliance was placed both upon *Collins* and the fact that the injury arose out of an assault committed by a Government employee. This Court determined that as long as the assault and battery was committed by an employee of the United States Government, any attempt to segregate and separately state a cause of action for negligence would be to no avail. The alleged negligence on the part of the Government was deemed to have arisen out of the assault and battery and to have formed an integral part of the entire incident which encompassed the battery. *See Moos* v. *United States,* 118 F.2d at 277. The Court considered it immaterial that the negligence occurred first in point of time. *See id.*

The Third Circuit, however, found *Collins* to be inapposite on its facts. It stated that

> [t]here are a number of distinguishing factors separating it from the case *sub judice.* It is the classic case of an intentional assault and battery except for the conclusory allegation that the Government knew or should have known the postal clerk had "malicious propensities." This conclusory statement, however, is based upon the very assault for which the action is brought. In this case, we are concerned with trainees who are drug addicts and have behavorial problems, under the care of the Government in a controlled environment and program designed to rehabilitate them. The Government accepted the duty of caring for and controlling them knowing of their drug addiction and instability. It was obliged to exercise reasonable care to prevent them from harming others.

457 F.2d at 1396. Since it chose not to overrule *Collins,* the Court of Appeals has apparently carved an exception to the rule exempting the Government from liability for assaults and batteries committed by its employees. It relied in part on *Rogers* v. *United States,* 397 F.2d 12, 15 (4th Cir. 1968), in which a prisoner claimed damages resulting from an assault by a third party. The Fourth Circuit in *Rogers* ignored the third party rationale and instead held section 2680(h) to be inapplicable because the claim "was founded on negligence even though assault or false imprisonment may [have been] collaterally involved." The Third Circuit's seeming reliance upon *Rogers* is quite confusing since the theory upon which the Fourth Circuit based its decision was specifically rejected by Judge Lord in the *Collins* case. Regardless of the Third Circuit's reasoning, however, its intervention is clear. It is therefore the opinion of this Court that if the United States undertook the task of establishing a Job Corps Training Center where it had the day-to-day authority over the process of selecting, controlling and disciplining trainees known to possess behavioral and drug addiction problems, a valid cause of action for negligence would exist against the United States based upon an assault or battery by one of its trainees.

The Third Circuit also based its decision on its belief that Congress had not intended section 2680(h) to apply to facts such as those in this case. Since there was the possibility that the effects of the narcotics were powerful enough to deprive Jessie of control of his mental power, the Court of Appeals believed he may have lacked the requisite mental element necessary for the commission of a battery. "In any event," the Circuit reasoned, "this would be a question of fact for the jury and not a matter of law determinable on the pleadings." 457 F.2d at 1396.

While voluntary intoxication may be a defense to a criminal charge requiring specific intent, in a civil context "it will not prevent the formation of general intent necessary for the commission of an assault and battery." *Esmond* v. *Liscio,* 209 Pa. Super. 200, 224 A.2d 793 (1966) (civil action for damages resulting from assault and battery). Even in the context of a criminal aggravated assault, since only a general intent is required for the commission of the act, the fact that intoxication eliminated specific intent is not a defense. *State* v. *Johnson,* 207 La. 161, 20 So. 2d 741 (1944); *F. Wharton, Criminal Law and Procedural, Assault, Battery, and Mayhem* §358, at 716 (12th ed. 1957); *see generally United States ex rel. Rucker* v. *Myers,* 311 F.2d 311 (3d Cir. 1962), *cert. denied,* 374 U.S. 844 (1963); *Annot.,* 8 A.L.R.3d 1236 (1966). This Court does not perceive a distinction between voluntary intoxication from alcohol and voluntary intoxication from drugs.

Total loss of control over one's mental faculties by virtue of drug addiction can also be analogized to insanity. It is clear that insanity is no defense to a civil suit for assault and battery. *See Aetna Casualty & Surety Co.* v. *Porter,* 181 F. Supp. 81 (D.D.C. 1960) (action based on

homicide); *Mullen* v. *Bruce,* 168 Cal. App. 2d 494, 335 P.2d 945 (Ct. App. 1959) (insane person held liable under statutory codification); *Bolen* v. *Howard,* 452 S.W.2d 401 (Ky. 1970); *Albicocco* v. *Nicoletto,* 11 App. Div. 2d 690, 204 N.Y.S.2d 566 (1960) (even if defendant was temporarily insane, he was nevertheless responsible for assault to same extent as if sane); *Van Vooren* v. *Cook,* 273 App. Div. 88, 75 N.Y.S. 2d 362 (1947) (defendant, patient in mental institution, held liable for assault and battery upon attendant); *W. Prosser, Law of Torts* §135, at 1000 (4th ed. 1971); *Annot.,* 77 A.L.R.2d 625 (1961); 41 Am. Jur. 2d, *Incompetent Persons* §§ 104-05 (1968). The rationale behind this seemingly harsh rule is that the law, rather than seeking to punish the insane wrongdoer, endeavors only to compensate the injured party for the damages sustained. *McIntyre* v. *Sholty,* 121 Ill. 660, 13 N.E. 239 (1887); *see McGuire* v. *Almy,* 297 Miss. 323, 8 N.E. 2d 760 (1937). *See generally Friedman, Mental Incompetency,* 79 L.Q. Rev. 502, 80 L.Q. Rev. 84 (1964); *Curran, Tort Liability of the Mentally Ill and Mentally Deficient,* 21 Ohio S.L.J. 52 (1960).

In overruling this Court's previous decision, the Third Circuit quoted from a Senate report with respect to Section 2680(h) as support for its position that Congress was willing to assume liability in situations such as that *sub judice.* The report stated that "[t]his section specified types of claims which would not be covered by this title. They include . . . *deliberate torts* such as assault and battery; and others. . . ." S. Rep. No. 1400, 79th Cong., 2d Sess., at 33 (1946) (emphasis by the Circuit Court). The Court seemed to place special significance on the fact that the assault and battery in this case would not have been "deliberate" if Jessie did not have sufficient possession of

his faculties. However, in order for an assault or battery to be "deliberate" the defendant must act merely with the intent of causing the contract or apprehension, or with knowledge on his part that such contract or apprehension is substantially certain to be produced. The motives of the actor are immaterial. Even if Jessie did not comprehend the difference between right and wrong at the time of the attack, it would seem that he would nonetheless be held civilly accountable for his act since the requisite mental element for the commission of a battery is a mere general intent to do the act complained of.

As further authority for its position that the Government may be liable for certain "deliberate" torts, the Circuit cited the following colloquy which occurred during hearings before the House Judiciary Committee with respect to section 2680(h).

> "Mr. Robsion. On that point of deliberate assault that is where some agent of the Government gets in a fight with some fellow?
>
> Mr. Shea. Yes.
>
> Mr. Robsion. And socks him?
>
> Mr. Shea. That is right.
>
> Mr. Cravens. Assume a C.C.C. automobile runs into a man and damages him then under the common law, where that still prevails, is not that considered an assault and is not the action based on assault and battery?
>
> Mr. Shea. I should think not. I should think under old common law rather that would be trespass on the case.
>
> Mr. Cravens. Trespass on the case?
>
> Mr. Shea. Yes.

> Mr. Cravens. I do not remember those things very well, but it seems to me there are some cases predicated on assault and battery even though they were personal injury cases.
>
> Mr. Shea. No; I think under common law pleading you have the same writ, but it makes a distinction between an assault and negligence.
>
> Mr. Cravens. This refers to a deliberate assault?
>
> Mr. Shea. That is right.
>
> Mr. Cravens: If he hit someone deliberately?
>
> Mr. Shea. That is right.
>
> Mr. Cravens: It is not intended to exclude negligent assaults?
>
> Mr. Shea. No. *An injury caused by negligence could be considered under the bill."* (emphasis supplied) Hearings on H.R. 5373 and H.R. 6463 Before the House Committee of the Judiciary, 77th Cong., 2nd Sess., ser. 13, at 33, 34 (1942).

This Court, unlike the Third Circuit reads that discussion as allowing recovery only in cases of negligence. The "negligent assault" that Mr. Cravens refers to can only mean general negligence since by definition assault is an intentional tort. Surely it cannot be said that in this case Jessie's conduct with respect to the plaintiff was in any way negligent. It was intentional even if done with the purest motives. In any event, further discussion of this question is unnecessary since it is this Court's finding that the plaintiff has failed to establish that Jessie was under the influence of narcotics, or that he lacked the requisite mental element necessary for the commission of a battery.

Appendix D

Turning now to the question of the Government's liability, it was the opinion of the Third Circuit that if the evidence sustained plaintiff's allegations that the United States had the day-to-day authority over the process of selecting, controlling and disciplining the trainees, it would follow that the Government undertook certain duties with respect to these trainees and that it had the responsibility of performing those duties with due care. 457 F.2d at 1394. The Court of Appeals cited the *Restatement* (*Second*) of Torts §319 which states:

> One who takes charge of a third person whom he knows or who should know to be likely to cause bodily harm to others if not controlled is under a duty to exercise reasonable care to control the third person to prevent him from doing such harm.

See also W. Prosser, Law of Torts, at 188 (2d ed. 1955). The Court further reasoned that

> [i]n the case *sub judice,* the duty to control the conduct of the trainees is even stronger since they were allegedly employees of the United States at the time and definitely under its control.

457 F.2d at 1394.

It is the finding of this Court, however, that although the United States did possess the authority and control over the trainee selection process, the day-to-day control of the Center's operations, including the disciplining of trainees, resided in F.E.C. Therefore, the criteria for liability as set forth by the Third Circuit in *Gibson* have not been satisfied. This Court will go beyond those criteria, however, and explore whether any other theory will support liability.

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Under general principles of agency, one who engages a contractor, who conducts independent business by means of his own employees, is not liable for the negligent acts of the contractor in performance of the contract. *Majestic Realty Associates, Inc.* v. *Toti Contracting Co.,* 54 N.J. Super. 419, 149 A.2d 288, *aff'd,* 30 N.J. 425, 153 A.2d 321 (1959); *Bacak* v. *Hogya,* 4 N.J. 417, 73 A. 2d 167 (1950); *Marion* v. *Public Service Elec. & Gas Co.,* 72 N.J. Super. 146, 178 A.2d 57 (App. Div. 1962). However, where the employer reserves to himself either control or the right to control the manner in which the work is to be performed, the law fastens vicarious liability upon the employer for tortious injuries caused by his contractor. *Majestic Realty Associates, Inc.* v. *Toti Contracting Co., supra; Errickson* v. *F.W. Schwiers, Jr., Co.,* 108 N. J. L. 481, 158 A. 482 (Ct. Err. & App. 1932); *see Peter* v. *Public Constructors, Inc.,* 368 F.2d 111 (3d Cir. 1966) (Pennsylvania law applied); *Galler* v. *Slurzberg,* 22 N. J. Super. 477, 92 A.2d 89 (App. Div. 1952).

In the present case, under the terms of the contract, the United States retained a right of control over the manner in which F.E.C. performed its functions. The scope of work to be performed by F.E.C. was to be performed "in such manner as directed by the Director of the Job Corps. . . ." Appendix A, Contract, Part II, Scope of Work. The preparation and revision of policies and procedures by F.E.C. were "subject to approval of the Contracting Officer" and implemented "as approved by the Project Manager. . . ." Appendix A, Exhibit B, Part II(A). Numerous other aspects of the Center's operation, including the extention of physical security, were subject to the approval of the Project Director. Guidelines for the control of the trainees' conduct were disseminated by O.E.O. and

pursuant to these guidelines F.E.C.'s personnel implemented specific rules and regulations. O.E.O. further had the responsibility to approve center staffing.

"Additionally, O.E.O. maintained a permanent site representative at Camp Kilmer whose function it was to report problem areas to Washington. O.E.O. was aware of discipline and narcotics problems at Camp Kilmer and was further aware of the need for a detention facility and tighter security. The fact that O.E.O. did not exercise its right of control in no way negates liability." *Trent* v. *Atlantic City Elec. Co.*, 334 F.2d 847 (3d Cir. 1964); *Majestic Realty Associates, Inc.* v. *Toti Contracting Co., supra.* It is this Court's holding then that the United States Govenrment retained sufficient control of the manner in which F.E.C.'s work was to be performed to render it liable to the plaintiff for the negligence of F.E.C. under the doctrine of *respondeat superior.*

There is another theory of liability, also based on the doctrine of *respondeat superior,* upon which responsibility may vest in the United States for the negligence of F.E.C. Simply stated, the contractee is liable where the work performed is inherently dangerous and the contractor's negligence causes injury within the scope of that danger. *Breece* v. *J.F. Chapman & Son, Inc.*, 302 F.2d 581 (3d Cir. 1962); *Majestic Realty Associates* v. *Toti Contracting Co., supra; Bergquist* v. *Penterman*, 46 N. J. Super. 74, 134 A.2d 20 (App. Div. 1957). In *Majestic Realty,* the New Jersey Appellate Division held that the distinguishing factor between inherently dangerous activities and others "is the probability that injurious consequences will attend their performance even if reasonable care is exercised." 54 N. J. Super. at 431, 149 A.2d at 294. In affirming that decision, the New Jersey Supreme Court stated that inherently

dangerous "signifies that danger inheres in the activity itself at all times, so as to require special precautions to be taken with regard to it to avoid injury." 30 N. J. at 435, 153 A.2d at 326. The Supreme Court further cited 23 A.L.R. 984 and 1084 (1923) as authority for the interpretation that "the term imports a danger which is incidental to and characteristic of the work itself, and not one which arises solely from the means and methods of its performance." 30 N. J. at 435, 153 A.2d at 326. *See generally Morris, Agency and Partnership,* 14 Rutgers L. Rev. 375, 376 (1960).

"It is the opinion of this Court, therefore, that when the United States created the Job Corps and affirmatively undertook a program of instruction, rehabilitation and care for Job Corps trainees, some of whom were known to be prone to violence and to possess behavioral and drug addiction problems, it was engaging in an inherently dangerous activity. The United States, therefore, had a duty to exercise reasonable care to insure the safety of persons coming in contact with its trainees. The Government breached its duty when it failed to provide for adequate safety precautions and is thus liable to the plaintiff regardless of the fact that it delegated certain functions to F.E.C., an independent contractor."

In light of the foregoing, it is the holding of this Court that 1) since the United States retained control of the manner in which F.E.C. performed its duties; and 2) since the operation of the Job Corps Center at Camp Kilmer constituted an inherently dangerous activity which was incapable of delegation to an independent contractor, the United States is liable to the plaintiff for the personal injuries which he sustained based on the doctrine of *respondeat superior.*

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The plaintiff shall submit an order in conformity with this opinion.

LAWRENCE A. WHIPPLE
Chief Judge, U.S.D.C.

Dated: March 14, 1975

APPENDIX A

PART II SCOPE OF WORK

The definition of scope of work of this contract shall be the operation and maintenance of a Job Corps residential training center, and the educating, training and otherwise providing for the general welfare of young men hereafter referred to as Enrollees, in such manner as directed by the Director of the Job Corps, to assist in the efficient accomplishment of the Office of Economic Opportunity duties, responsibilities and mission, principally at the site identified under the Part of this Contract entitled Site.

PART XII ASSIGNMENT AND SEPARATION

The Project Manager shall specifically inform the Contractor of the Enrollees assigned by the Job Corps to the Training Center to be operated under this contract.

The separation or discharge of an Enrollee from the Training Center shall be the sole responsibility of the Director of the Job Corps.

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PART XVIII SUPPORT BY OFFICE OF ECONOMIC OPPORTUNITY

It is the intent of the parties that the Contractor will, so far as practicable, avoid incurring costs by purchasing material and supplies or in duplicating work capacity available to any Government installation involved in the performance of this contract. Therefore, the Contractor will utilize all available Government working space, equipment, supplies, materials and services at any installation, activity or office where work under this contract is involved. Such items will be made available to the Contractor in reasonable amounts on a no-charge-for-use basis. The Contractor shall report any inadequacies or non-availability of the items referred to herein with a recommended plan for obtaining the requested items to the Contracting Officer who shall promptly determine the validity and extent of the requirement and the manner in which any approved requirement will be filled (as by purchase, rental or lease). The Contractor shall not purchase or otherwise incur costs for any requirement under this clause without written approval of the Contracting Officer of the terms of the proposed purchase or other arrangement. Items of a capital nature (facilities) shall not be purchased under the authority of this clause.

PART XXI SPECIAL ALLOWABLE COSTS

Without limiting the general criteria and specific limitations imposed by the clause of the General Provisions entitled "Allowable Cost, Fixed Fee and Payment" of this contract, the Contractor may at the specific request of the Contracting Officer perform the following services which shall be considered allowable items of cost.

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"A. Service Involving Building and Other Facilities.

Rearrange, maintain, repair and perform other necessary services to any buildings, facilities or utilities, affecting the operation of the Training Center."

PART XXV SITE

The Government is to provide the site including the buildings described in the letter from General Services Administration to O.E.O. dated November 24, 1964: "Such additional areas and buildings may be made available to the Contractor as are mutually agreed upon."

PART XXX MEALS AND LODGING, NON-ENROLLEES

Contractor agrees to provide meals and lodging at no charge to Enrollees in accordance with terms of this contract.

"No other person or groups of persons shall receive any meal or lodging at the Training Center except on terms or at prices approved by the Project Manager."

PART XXXI REVENUE FROM SALES OR SERVICES AT TRAINING CENTER

All revenues generated at the Training Center shall be collected, disbursed and further handled as directed by the Project Manager.

PART XXXII JOB CORPS REPRESENTATIVE

Contractor to provide such services as Project Manager deems necessary "for the support of a Job Corps repre-

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sentative in residence at the Site, together with such Job Corps staff as may be assigned by the Project Manager to assist him.

EXHIBIT B, II

A. Preparation and Revision of Policies and Procedures

The Contractor shall prepare and revise as necessary, in accordance with O.E.O. policies, subject to the approval of the Contracting Officer, and implement as approved by the Project Manager, the policies and procedures under which operation and maintenance functions necessary to support the said Training Center will be performed.

EXHIBIT A

(TECHNICAL WORK STATEMENT)

I. GENERAL

This contract is for the establishment and operation of a Job Corps Training Center for a comprehensive residential program to prepare Job Corps Enrollees for useful employment and the responsibilities of citizenship.

II. WORK TO BE PERFORMED

In carrying out this responsibility, the Contractor will provide such services as are necessary to support the Enrollee at the Center and to assist the Job Corps in the accomplishment of its mission. The Contractor shall pro-

Appendix D

vide his best efforts to accomplish in a continuing manner the operation of a residential Training Center, including such elements as the following:

A. Vocational Skill Training

B. Basic and General Education

C. Useful Work Experience

D. Physical Fitness, Recreation, and Health Education

E. Medical and Dental Care

F. Counseling and Guidance

G. Job Placement Assistance

H. Training Center Administration

A. *Vocational Skill Training*

The Contractor shall provide vocational skill training which will serve to furnish each Enrollee with sufficient technical knowledge, familiarization with specific work methods, relevant supervised practice, understanding of acceptable standards of workmanship, awareness of safety responsibilities, and proper work habits to permit him, upon completion of training, to obtain employment at the entry level or above in a defined occupation.

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EXHIBIT B

(Operation and Maintenance Work Statement)

I. General

The Contractor shall perform the operation and maintenance functions necessary to support the Job Corps Training Center to be located on the site formerly known as Camp Kilmer, New Jersey.

II. Work to be Performed

The Contractor shall make available his personnel and facilities and exert his best efforts to provide supplies and services which shall include but not be limited to the following:

A. Preparation and Revision of Policies and Procedures

The Contractor shall prepare and revise as necessary, in accordance with OEO policies, subject to the approval of the Contracting Officer, and implement as approved by the Project Manager, the policies and procedures under which operation and maintenance functions necessary to support the said Training Center will be performed.

B. Logistical Support

In accordance with OEO policies, and Contractor operational policies approved by the Contracting Officer, the Contractor shall requisition, receive, warehouse and store, issue and account for and in general manage the following areas:

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1. Materials
2. Clothing
3. Supplies
4. Equipment
5. Facilities
6. Vehicles
7. Tools
8. Machinery
9. Other things as identified by OEO policies or directed by the Contracting Officer.

C. Services

The Contractor shall provide services and in general manage the following areas:

1. Food services
2. Mail
3. Telephone and other utilities
4. Repair
5. Equipment lease and rental
6. Physical security
7. Building maintenance and rearrangement
8. Fire protection
9. Other things as identified by OEO policies or directed by the Contracting Officer.

APPENDIX E

Prior Opinion of the United States Court of Appeals for the Third Circuit (457 F.2d 1391)

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 19,253

RONALD GIBSON, *Appellant*

v.

UNITED STATES OF AMERICA

(D. C. Civil Action No. 1147-68)

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Argued September 16, 1971

Before BIGGS, ADAMS and ROSENN, *Circuit Judges*

OPINION OF THE COURT

(Filed March 30, 1972)

ROSENN, *Circuit Judge.*

This appeal is from an order dismissing with prejudice an action brought against the United States under the

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Federal Tort Claims Act, for personal injuries inflicted by the alleged negligence and omissions of Government employees. The district court apparently dismissed the complaint for lack of jurisdiction over the subject matter, believing the cause of action came within the exception provided by 28 U.S.C. §2680(h).[1]

The complaint makes the following allegations relevant to our decision: The appellant, Gibson, a college graduate, 26 years of age, was employed by the Federal Electric Co. to train Job Corps enrollees at the Raritan Arsenal in Edison, New Jersey. One Jessie, a juvenile delinquent with a known addiction to narcotics, was a Job Corps enrollee employed and housed by the United States at the arsenal. On November 5, 1966, Jessie, while under

[1] The district court's treatment of appellee's motion to dismiss under Fed. R. Civ. P. 12(b)(1) requires elaboration. Both the district court's opinion, and the order filed pursuant to that opinion, speak of dismissal "on the ground that the Court lacks jurisdiction over the subject matter thereof." However, simultaneously, the district court noted that it was granting the motion under Rule 12(b)(6) failure to state a claim upon which relief can be granted. Moreover, there is some indication that the court may have treated the motion to dismiss as one for summary judgment under Rule 56, as allowed under Rule 12(b)(6).

It seems settled that any objection raised by the defendant which is based upon the exceptions listed in §2680 goes to the issue of jurisdiction over the subject matter and hence to Rule 12(b)(1). Dalehite v. United States, 346 U.S. 15 (1953); Konecny v. United States, 388 F.2d 59 (8th Cir. 1967); Sanchez Tapia v. United States, 338 F.2d 416 (2d Cir. 1964); *Contra* Collins v. United States, 259 F.2d 363 (E.D. Pa. 1966).

We treat the motion to dismiss in the terms in which it was presented to the district court, as a motion under Rule 12(b)(1).

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the influence of narcotics and engaged in his employment with the United States, plunged a screwdriver through the appellant's temple while the latter was engaged in the performance of his duties as a Job Corps leader and instructor. The United States knew its enrollees were dangerously sick, mentally and morally, and was under a duty to take reasonable precautions and provide reasonable safety measures for the protection of such people as the appellant, who were required, as Job Corps leaders and instructors, to live and work with these enrollees. The United States was negligent in failing to take reasonable measures for appellant's safety, thereby causing him to suffer injuries for which he seeks damages in the sum of $500,000.

Appellant claims to have presented for filing in the district court a "supplemental factual statement" in opposition to the Government's motion to dismiss his complaint. At that time, he was represented by an attorney who subsequently withdrew from the practice of law. His present counsel, substituted by order of the district court on July 27, 1970, has advised this court that the supplemental factual statement attached to the plaintiff's brief in the district court contained a request that it be *filed*. The docket entries do not reveal that it was filed and there is no indication of district court action concerning this statement.

The supplemental factual statement makes the following allegations: Prior to the attack upon the appellant, there had been incidents at the arensal of boys hitting other trainees with steel pipes and of "full-blown riots." Employees of the Office of Economic Opportunity had day-to-day authority over the process of selecting, controlling, disciplining and eliminating trainees. They were aware that the Federal Electric Co., the contractor conducting the program, did not have authority or equipment to prevent

physical harm to the teachers. Personnel of the Office of Economic Opportunity at the *operational level* were given reports of serious incidents which preceded appellant's injuries, including the riots, drug addiction of trainees, and the acceptance into the Job Corps program at the arsenal, of trainees who were vicious, brutal juvenile offenders and drug addicts. (emphasis supplied)

In addition to a substantial denial of the allegations of the complaint, the appellee pleaded certain affirmative defenses, the most important of which were:

(1) The plaintiff's claim arises out of an assault and battery and is therefore barred by 28 U.S.C. §2680(h);[2] and

(2) The plaintiff's claim is based on a discretionary duty or function and is barred by 28 U.S.C. §2680(a).[3]

The district court sustained the motion to dismiss under the provisions of §2680(h), as a claim arising out of assault and battery. We believe that this was error.

Since this matter comes to us on an appeal from a motion to dismiss we take as true all of the allegations of

---

[2] 28 U.S.C. §2680(h) reads: "(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights."

[3] 28 U.S.C. §2680(a) provides: "(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a fedeal agency or an employee of the Government, whether or not the discretion involved be abused."

the complaint. *Cooper* v. *Pate,* 378 U.S. 546 (1964). Although the supplemental statement of facts has not been incorporated into the pleadings, we will, in view of the decision we reach, treat the averments therein as properly pleaded and true. The supplemental factual statement merely elaborates, but does not change the theory on which the complaint was brought. It does not introduce a new cause of action. Under these circumstances, we think the interests of justice would best be served by treating the supplemental factual statement for the purpose of this appeal as if it were part of the record, and specifically granting leave to amend on remand. *cf. Jones* v. *Freeman,* 400 F.2d 383, 387 (8th Cir. 1968); *Kaufman* v. *Western Union Telegraph Co.,* 224 F.2d 723, 725 (5th Cir. 1955); *Brooks* v. *Yawkey,* 200 F.2d 663 (1st Cir. 1953).

Except for certain areas of tort law specifically excluded, the Federal Tort Claims Act was enacted to provide a judicial remedy for those who suffer injury or damage as a result of the negligence or misconduct of an employee of the United States. In the case *sub judice,* liability is asserted against the United States because it affirmatively undertook a training program for dangerous, mentally ill young men who were known to be violent juvenile offenders and drug addicts, placed them under its control and custody on a day-to-day basis, but failed to exercise reasonable care by providing safety measures for the protection of instructors required to live and work with such trainees.

Ordinarily, there is no general duty to act for the protection of others. However, having undertaken a program of instruction, rehabilitation and care for these trainees, was the United States, or its agency in charge of the program under the affirmative duty to prevent those persons,

recruited to train and instruct, from sustaining harm at the hands of these dangerous and violence prone trainees? We think it was. "When an agency of the United States voluntarily undertakes a task, it can be held to have accepted the duty of performing that task with due care." *Rogers* v. *United States,* 397 F.2d 12, 14 (4th Cir. 1968).

While it is acknowledged that the Office of Economic Opportunity entered into a contract with the Federal Electric Co. to conduct the program, appellant alleges that Federal Electric had no authority or equipment to prevent physical harm to the teachers. He asserts that it was the Office of Economic Opportunity who had the day-to-day authority over the process of selecting, controlling and disciplining the trainees. If the evidence sustains these allegations, it would appear then that the United States undertook certain duties with respect to these trainees and that it had the responsibility of performing them with due care. The exercise of due care under such circumstances might well require reasonable safety measures on the part of operational personnel in the program for the safety of those instructing the trainees.

> One who takes charge of a third person whom he knows or who should know to be likely to cause bodily harm to others if not controlled is under a duty to exercise reasonable care to control the third person to prevent him from doing such harm.
>
> Restatement of Torts, 2d, §319.

According to Prosser, *Torts* (2d Ed. 1955), the general duty which arises in many relationships to take reasonable precautions for the safety of others "may include the obligation to exercise control over the conduct of third persons." Prosser, supra, at 188. In the case *sub judice,* the

duty to control the conduct of the trainees is even stronger since they were allegedly employees of the United States at the time and definitely under its control.

While there are ample allegations in the complaint of a breach of duty by the United States because of a failure to exercise due care for the safety of instructors in the training program, the Government contends that the district court properly dismissed the complaint for lack of jurisdiction under Section 2680(h), the assault and battery exception of the Federal Tort Claims Act.

We disagree for two reasons: First, the attack upon Gibson was a foreseeable consequence of the Government's failure to exercise due care *under the circumstances* and, therefore, it *is not such an intervening act as will sever the necessary causal relation between the negligence and the appellant's injuries.*

> Here the very risk which constitutes the defendant's negligence is the probability of such action. It is clear that when such action occurs, it should not insulate the defendant's negligence under the causation formula. In other words, it is clearly unsound to afford immunity to a negligent defendant because the intervening force, the very anticipation of which made his conduct negligent, has brought about the expected harm.[4]

Under the appellant's allegations, the injury arose out of the basic negligence of the United States and the attack was the foreseeable consequence of the original misconduct. "That the foreseeable danger was from intentional

---

[4] Harper and Kime, *The Duty to Control the Conduct of Another,* 43 YALE L.J. 886, 898 (1934).

or criminal misconduct is irrelevant; respondent nonetheless had a duty to make reasonable provision against it. *Breach of that duty would be negligence. . . .*" (emphasis supplied) *Lillie* v. *Thompson,* 332 U.S. 459, 462 (1947); *Harrison* v. *Missouri Pacific R. Co.,* 372 U.S. 248 (1962). Under such circumstances, the attack was not an intervening act and the tort did not arise out of the assault and battery. It had its roots in the Government's negligence.

Second, we do not believe that Congress intended that the exception would apply to the facts at hand. Section 2680(h) addresses itself primarily to intentional torts for which Congress was unwilling to assume liability. "This section [28 U.S.C. §2680] specifies types of claims which would not be covered by this title. They include . . . *deliberate torts* such as assault and battery; and others. . . ." (emphasis supplied) S. Rep. No. 1400, 79th Cong., 2d Sess., at 33 (1946)[5] Jayson, Handling Federal Tort Claims, Vol. 2, Sec. 260.01 n. 1.

---

[5] In the hearings before the Committee on the Judiciary, House of Representatives, the following colloquy occurred with respect to this exception.

> "Mr. Robsion. On that point of deliberate assault that is where some agent of the Government gets in a fight with some fellow?
>
> Mr. Shea. Yes.
>
> Mr. Robsion. And socks him?
>
> Mr. Shea. That is right.
>
> Mr. Cravens. Assume a C.C.C. automobile runs into a man and damages him then under the common law, where that still prevails, is not that considered an assault and is not the action based on assault and battery?

(Footnote continued on following page)

Does the injury sustained by Gibson arise out of an assault and battery? Assault and battery by definition are intentional acts. Intention is the very essence of the tortious act.[6] Congress intended to exclude liability for injuries caused by intentional misconduct[7] and not for negli-

---

(Footnote continued from preceding page)

> Mr. Shea. I should think not. I should think under old common law rather than would be trespass on the case.
>
> Mr. Cravens. Trespass on the case?
>
> Mr. Shea. Yes.
>
> Mr. Cravens. I do not remember those things very well, but it seems to me there are some cases predicated on assault and battery even though they were personal injury cases.
>
> Mr. Shea. No; I think under common-law pleading you have the same writ, but it makes a distinction between an assault and negligence.
>
> Mr. Cravens. This refers to a deliberate assault?
>
> Mr. Shea. That is right.
>
> Mr. Cravens. If he hit someone deliberately?
>
> Mr. Shea. That is right.
>
> Mr. Cravens. It is not intended to exclude negligent assaults?
>
> Mr. Shea. No. *An injury caused by negligence could be considered under the bill.*" (emphasis supplied) Hearings on H.R. 5373 and H.R. 6463 Before the House Committee of the Judiciary, 77th Cong., 2nd Sess., ser. 13, at 33, 34 (1942).

[6] "An essential difference between assault and battery, on the one hand, and negligence, on the other, is this element of intent. The essence of negligence is unintentional injury to another." Jayson, Handling Federal Tort Claims, Vol. 2, 260.02.

[7] "At common law, the remedy for the *intentional* infliction of bodily harm resulting directly from the actor's conduct was redressed by an action of trespass for battery. Therefore, bodily harm so caused and, indeed, the act which caused it were both customarily called a battery." (emphasis supplied) Restatement of Torts, 2d, Vol. 1, Ch. 2, p. 23.

gence. This is consistent with the strong public policy expressed in the statute to waive immunity for injuries caused by negligence of employees and to except claims arising out of assault or battery. In the case *sub judice,* the allegations are that when Jessie plunged the screwdriver through Gibson's temple, Jessie was "then and there under the influence of narcotics." If the effects of the narcotics were powerful enough to deprive him of control of his mental powers, *the requisite mental element* necessary for the battery may well be absent. In any event, this would be a question of fact for the jury and not a matter of law determinable on the pleadings.

The district court believed that *Collins* v. *United States,* 259 F. Supp. 363 (E.D. Pa. 1966), settled the issue. *Collins* was an action predicated on the alleged negligence of the Government in hiring and retaining in its employ an employee who "pushed, hit and struck" the plaintiff. The complaint alleged that the Government was negligent in hiring and retaining an employee whom it knew or should have known had "malicious propensities."

We believe that *Collins* is inapposite on its facts. There are a number of distinguishing factors separating it from the case *sub judice.* It is the classic case of an intentional assault and battery except for the conclusory allegation that the Government knew or should have known the postal clerk had "malicious propensities." This conclusory statement, however, is based upon the very assault for which the action is brought. In this case, we are concerned with trainees who are drug addicts and have behavioral problems, under the care of the Government in a controlled environment and program designed to rehabilitate them. The Government accepted the duty of caring for and controlling them knowing of their drug addiction

and instability. It was obliged to exercise reasonable care to prevent them from harming others.

One comment should be made upon other cases, in other courts, which have been presented to us as bearing upon our decision. Although recovery was allowed notwithstanding the commission of an assault and battery, in several of these cases the assault exception was held inapplicable because the assaults were committed by third parties who were not Government employees.[8] None of these cases found it necessary to consider facts analogous to those presented in this proceeding. In one case, however, the Fourth Circuit did not rely on the third party situation but held the assault exception did not apply since the claim was "founded on negligence even though assault or false imprisonment may be collaterally involved." *Rogers* v. *United States,* supra, at 15.

There remains the problem of whether the action should still be dismissed because of the bar of §2680(a), the

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[8] Muniz v. United States, 305 F.2d 285, 287 (2d Cir. 1962), aff'd. United States v. Muniz, 374 U.S. 150 (1963), allowed suit for damages by a federal prisoner against the United States based on negligence in handling of prisoners. Although the injuries arose out of an assault and battery, by one prisoner upon another, the circuit court held that the assault exception did not apply "to assaults by third parties which the Government negligently fails to prevent." Rogers v. United States, 397 F.2d 12 (4th Cir. 1968), likewise involved an assault upon a prisoner by a third party, not a Government employee. In Underwood v. United States, 356 F.2d 92, 100 (5th Cir., 1966), summary judgment for the Government was reversed where an airman who had been hospitalized for mental illness shot and killed his wife. He was not on duty when he shot his wife and the 'United States . . . did not rely on the exception of a claim arising out of assault' embodied in 28 U.S.C.A. Section 2680(h)."

discretionary exception of the Tort Claims Act. We note, initially, that the district court did find it necessary to reach this issue. Thus, the parties have not had an opportunity to amend their pleadings after guidance by the district court. This raises some question as to whether it would be proper to dismiss, on this issue, as this point. *See* 2A Moore's Federal Practice ¶12.14.

Moreover, we believe that considering the supplementary statement as part of the pleadings, it would be improper to dismiss this case. The facts thus pleaded show negligence on the *operational* level. Appellant has alleged facts which point toward a growing danger within this particular installation. He draws attention to antecedent "riots, and stabbings," and to a comprehensive security program submitted in response to this growing danger but ignored. These allegations are not directed to the general guidelines along which the program was developed but to misconduct at the operational level.

> The application of . . . policy *to the individual case* is an administrative decision at the operational level which if negligently done will make the government liable . . .
>
> (emphasis supplied)
>
> *White* v. *United States,* 317 F.2d 13, 17 (4th Cir. 1963); *United States* v. *Hunsucker,* 314 F.2d 98 (9th Cir. 1962), and cases cited therein.

None of the other defenses pleaded by appellee before the district court have been briefed or argued before this court. Nor has the district court made a ruling on them.

The order of the district court will be reversed, and the case remanded with leave to amend for further proceedings not inconsistent with this opinion.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit

APPENDIX F

Relevant Statutes

28 U.S.C. (Federal Tort Claims Act)

§ 1346. United States as defendant

(a) The district courts shall have original jurisdiction, concurrent with the Court of Claims, of:

(b) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

§ 2671. Definitions

As used in this chapter and sections 1346(b) and 2401 (b) of this title, the term "Federal agency" includes the executive departments, the military departments, independent establishments of the United States, and corporations primarily acting as instrumentalities or agencies of the United States, but does not include any contractor with the United States.

"Employee of the government" includes officers or employees of any federal agency, members of the military or naval forces of the United States, and persons acting on

behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation.

"Acting within the scope of his office or employment", in the case of a member of the military or naval forces of the United States, means acting in line of duty.

As amended July 18, 1966, Pub.L. 89-506, § 8, 80 Stat. 307.

§ 2674. Liability of United States

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof. June 25, 1948, c. 646, 62 Stat. 983.

§ 2680. Exceptions

The provisions of this chapter and section 1346(b) of this title shall not apply to—

(a) Any claim based upon an act or omission of an employee of the Government, exercising due

care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exericse or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.

42 U.S.C. (Economic Opportunity Act)

Part A.—Job Corps

§ 2711. Statement of purpose

This part estabilshes a Job Corps for low-income, disadvantaged young men and women, sets forth standards and procedures for selecting individuals as enrollees in the Job Corps, authorizes the establishment of residential and/or nonresidential centers in which enrollees will participate in intensive programs of education, vocational training, work experience, counseling, and other activities, and prescribes various other powers, duties and responsibilities incident to the operation and continuing development of the Job Corps. Its purpose is to assist young persons who need and can benefit from an unusually intensive program, operated in a group setting, to become more responsible, employable, and productive citizens; and to do so in a way that contributes, where feasible, to the development of National, State, and community resources, and to the development and dissemination of techniques for working with the disadvantaged that can be widely utilized by public and private institutions and agencies.

Pub.L. 88-452, Title I, § 101, Aug. 20, 1964, 78 Stat. 508; Pub.L. 90-222, Title I, § 101, Dec. 23, 1967, 81 Stat. 672.

§ 2712. Establishment of Job Corps

There is hereby established within the Office of Economic Opportunity a "Job Corps".

§ 2713. Individuals eligible for the Job Corps

To become an enrollee in the Job Corps, a young man or woman must be a person who—

(1) is a permanent resident of the United States who has attained age fourteen but not attained age twenty-two at the time of enrollment;

(2) is a low-income individual or member of a low-income family who requires additional education, training, or intensive counseling and related assistance in order to secure and hold meaningful employment, participate successfully in regular schoolwork, qualify for other training programs suitable to his needs, or satisfy Armed Forces requirements;

(3) is currently living in an environment so characterized by cultural deprivation, a disruptive homelife, or other disorienting conditions as to substantially impair his prospects for successful participation in any other program providing needed training, education, or assistance;

(4) is determined, after careful screening as provided for in sections 2714 and 2715 of this title, to

have the present capabilities and aspirations needed to complete and secure the full benefit of the program authorized in this part, and to be free of medical and behavioral problems so serious that he could not or would not be able to adjust to the standards of conduct and discipline or pattern of work and training which that program involves; and

(5) meets such other standards for enrollment as the Director may prescribe (including special standards for the enrollment on a residential basis of 14 and 15 year olds) and agrees to comply with all applicable Job Corps rules and regulations.

§ 2714. SCREENING AND SELECTION OF APPLICANTS; GENERAL PROVISIONS

(a) The Director shall prescribe necessary rules for the screening and selection of applicants for enrollment in the Job Corps. To the extent practicable, these rules shall be implemented through arrangements which make use of agencies and organizations such as community action agencies, public employment offices, professional groups, and labor organizations. The rules shall establish specific standards and procedures for conducting screening and selection activities; shall encourage recruitment through agencies and individuals having contact with youths over substantial periods of time and able, accordingly, to offer reliable information as to their needs and problems; and shall provide for necessary consultation with other individuals and organizations, including court, probation, parole, law enforcement, education, welfare, and medical authorities and advisers. They shall also provide for—

(1) the interviewing of each applicant for the purpose of—

(A) determining whether his educational and vocational needs can best be met through the Job Corps or any alternative program in his home community;

(B) obtaining from the applicant pertinent data relating to his background, needs, and interests for evaluation in determining his eligibility and potential assignment; and

(C) giving the applicant a full understanding of the Job Corps program and making clear what will be expected of him as an enrollee in the event of his acceptance.

(2) the conduct of a careful and systematic inquiry concerning the applicant's background for the effective development and, as appropriate, clarification of information concerning his age, citizenship, school and draft status, health, employability, past behavior, family income, environment, and other matters related to a determination of his eligibility.

(b) The Director shall make no payments to any individual or organization solely as compensation for the service of referring the names of candidates for enrollment in the Job Corps.

(c) The Director shall take all necessary steps to assure that the enrollment of the Job Corps includes an appropriate number of candidates selected from rural areas, taking into account the proportion of eligible youth who reside in rural areas and the need to provide residential

facilities for such youth in order to meet problems of wide geographic dispersion.

§ 2715. REASONABLE LIKELIHOOD OF SUCCESSFUL PARTICIPATION BY ENROLLEES; PROBATION AND PAROLE

(a) No individual shall be selected as an enrollee unless it is determined that there is reasonable expectation that he can participate successfully in group situations and activities with other enrollees, that he is not likely to engage in actions or behavior that would prevent other enrollees from receiving the benefit of the program or be incompatible with the maintenance of sound discipline and satisfactory relationships between any center to which he might be assigned and surrounding communities, and that he manifests a basic understanding of both the rules to which he will be subject and of the consequences of failure to observe those rules. Before selecting an individual who has a history of serious and violent behavior against persons or property, repetitive delinquent acts, narcotics addiction, or other major behavioral aberrations, the Director shall obtain a finding from a professionally qualified person who knows such potential enrollee's individual situation that there is reasonable expectation that his conduct will not be inimical to the goals and success of the Job Corps and that the opportunity provided by the Job Corps will help him to overcome his problem.

(b) An individual who otherwise qualifies for enrollment may be selected even though he is on probation or parole, but only if his release from the immediate supervision of the cognizant probation or parole officials is mutually satisfactory to those officials and the Director and does not violate applicable laws or regulations, and

if the Director has arranged to provide all supervision of the individual and all reports to State or other authorities that may be necessary to comply with applicable probation or parole requirements.

§ 2727. APPLICATION OF PROVISIONS OF FEDERAL LAW

(a) Except as otherwise specifically provided in the following paragraphs of this subsection and in section 8143(a) of Title 5, enrollees in the Jobs Corps shall not be considered Federal employees and shall not be subject to the provisions of law relating to Federal employment, including those regarding hours of work, rates of compensation, leave, unemployment compensation, and Federal employee benefits:

(1) For purposes of the Internal Revenue Code of 1954 and title II of the Social Security Act, enrollees shall be deemed employees of the United States and any service performed by an individual as an enrollee shall be deemed to be performed in the employ of the United States.

(3) For purposes of the Federal tort claims provisions in Title 28, enrollees shall be considered employees of the Government.

FILED
MAY 9 1978
MICHAEL RODAK, JR., CLERK

No. 77-1247

In the Supreme Court of the United States

OCTOBER TERM, 1977

RONALD GIBSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,

BARBARA ALLEN BABCOCK,
Assistant Attorney General,

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In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1247

RONALD GIBSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-34a) is reported at 567 F.2d 1237. The opinion of the district court (Pet. App. 40a-74a) is not reported. A prior opinion of the court of appeals (Pet. App. 75a-87a) is reported at 457 F.2d 1391.

JURISDICTION

The judgment of the court of appeals (Pet. App. 35a-36a) was entered on December 15, 1977. A

timely petition for rehearing was denied on February 1, 1978 (Pet. App. 38a-39a). The petition for a writ of certiorari was filed on March 7, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the record in this case establishes any direct negligence of government employees in failing to ensure that an independent contractor take additional precautions when dealing with aggressive youths.

STATUTES INVOLVED

1. 28 U.S.C. 1346(b) provides in pertinent part:

> Subject to the provisions of chapter 171 of this title, the district courts * * * shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages * * * for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

2. 28 U.S.C. 2671 provides in pertinent part:

> * * * "Federal agency" includes the executive departments, the military departments, independent establishments of the United States, and corporations primarily acting as instrumentalities or agencies of the United States, but does not include any contractor with the United States.
>
> "Employee of the government" includes officers or employees of any federal agency * * *.

3. 28 U.S.C. 2680(h) provides in pertinent part:

> The provisions of this chapter and section 1346(b) of this title shall not apply to—
>
> * * * * *
>
> (h) Any claim arising out of assault, battery * * *.

4. Section 116(a)(3), Economic Opportunity Act of 1964, as added, 81 Stat. 681, 42 U.S.C. 2727(a)(3), provided:[1]

> For purposes of the Federal tort claims provisions in title 28, United States Code, [Job Corps] enrollees shall be considered employees of the Government.

STATEMENT

In 1966 petitioner was an employee of Federal Electric Company (FEC), which had contracted with the Office of Economic Opportunity (OEO) to operate the Camp Kilmer Job Corps Center at a federal reservation at Edison, New Jersey (Pet. App. 47a, 50a). On November 5, 1966, Andrew Jessie, one of the Job Corps enrollees at the Kilmer Center, stabbed petitioner with a screwdriver, severely injuring him

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[1] A substantially identical provision now appears in Section 416(a)(3), Comprehensive Employment and Training Act of 1973, 87 Stat. 872, 29 U.S.C. (Supp. V) 926(a)(3).

(Pet. App. 50a-52a). After collecting workers' compensation benefits from Federal Electric Company's insurer, petitioner brought this action in the United States District Court for the District of New Jersey under the Federal Tort Claims Act (Act), alleging that his injury was caused by the negligent or wrongful act or omission of employees of the United States.

The district court initially dismissed the complaint on the ground that the claim was one "arising out of assault [or] battery" and thus barred by 28 U.S.C. 2680(h). The court of appeals reversed and remanded for trial (Pet. App. 75a-87a), holding that the assault and battery exception of the Federal Tort Claims Act did not apply to the facts alleged in the complaint, which included an allegation that the government itself negligently controlled the Job Corps enrollees at the Kilmer Center (Pet. App. 80a-82a). In the court of appeals' view, although any action on the stabbing itself would be barred by Section 2680 (h), the United States still might be liable for failure to prevent the stabbing.[2]

After a non-jury trial, the district court found that "[a]lthough O.E.O. had broad supervisory authority over the Camp Kilmer Job Corps Center, control over the Center's day-to-day operations resided in [Federal Electric Company]" (Pet. App. 47a). Despite this

[2] The court also stated that the assault exception might not be applicable if Jessie were under the influence of narcotics at the time of the stabbing (Pet. App. 84a). The district court found that Jessie was not under the influence (*id.* at 63a), and this question has dropped out of the case.

fact, the district court held that the United States is liable "for the negligence of [Federal Electric Company]" under the doctrine of *respondeat superior* (*id.* at 66a). The court reasoned both that OEO exercised general supervisory control over Job Corps Centers (*id.* at 65a-66a) and that the Job Corps program was an "inherently dangerous activity," making the government liable for the contractor's negligence (*id.* at 66a-67a).

Following a separate trial on damages, the district court in September 1976 entered a final judgment of $106,980 against the United States (Pet. App. 5a).

The court of appeals reversed (Pet. App. 1a-21a). Noting that the district court did not have the benefit of *United States* v. *Orleans*, 425 U.S. 807, the court of appeals held that *Orleans* foreclosed both theories on which the district court had relied.[3] The court initially held (Pet. App. 11a-12a):

[3] The district court's theories of vicarious liability were essential to its judgment. Although Jessie, as a Job Corps enrollee, was treated as a federal employee (see 42 U.S.C. (1970 ed.) 2727(a)(3)), that does not assist petitioner; "Jessie's actions cannot be imputed to the United States because the [Act] does not apply to any 'claim arising out of assault [or] battery. . . .' 28 U.S.C. § 2680(h)" (Pet. App. 10a n. 7). As the court of appeals recognized in its first decision, only the negligent supervision of Jessie could give rise to liability. (Although we believe that imposing liability for failure to prevent a battery is functionally indistinguishable from imposing liability for the battery itself (see Pet. App. 54a-63a), there is no reason for this Court to consider whether the court of appeals erred in stating that liability could be proved under this theory. If the Court should grant the petition, however, we would argue that the bar of Section 2680(h) offers an alternative ground to affirm the court of appeals' judgment.)

> While it may be argued that OEO exercised a greater degree of control over the Job Corps program and the FEC, than it did over community action agencies of the type involved in *Orleans*, nonetheless the district court specifically found that the government exercised no operational, day-to-day control over Camp Kilmer or FEC's employees.
>
> * * * The fact of broad, supervisory control, or even the potential to exercise detailed control, cannot convert a contractor into an agent, nor can it be the basis for imposing vicarious liability on the United States. *United States* v. *Orleans*.

The court of appeals also held (Pet. App. 14a-15a) that petitioner could not recover under the "inherently dangerous activity" doctrine because that doctrine imposes liability on an employer for the negligence of a contractor, while the Act allows recovery only for the negligence of the government's employees. See 28 U.S.C. 1346(b); *United States* v. *Orleans, supra*.[4]

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[4] Aside from holding that the "inherently dangerous activity" doctrine is not available under the Federal Tort Claims Act, the court of appeals pointed out that "[w]hether the facts of this case present a situation to which [that doctrine] may properly be applied is not at all clear. We are not convinced that a Job Corps center * * * is inherently dangerous" (Pet. App. 13a n. 10). In addition, the court of appeals observed that the doctrine may be "limited to third parties such as innocent bystanders or adjacent landowners" and not available to petitioner, who was an employee of the independent contractor (*ibid.*). In view of its disposition of the case, the court did not resolve these questions.

The court of appeals then considered a third theory of liability—that of alleged "direct negligence" of the United States, based on the theory "that OEO had notice of a dangerous situation, by virtue of the fact that it knew that many enrollees were drug users, had criminal records, or were otherwise potentially violent * * *" (Pet. App. 17a). Under this theory OEO purportedly had a direct "duty to the [petitioner] * * * to take reasonable measures to assure adequate discipline and security" (*ibid.*). With respect to this theory, the court held (*id.* at 17a-18a):

> Assuming without deciding that such a theory of liability is a viable one under the FTCA, and that no discretionary function was implicated, nevertheless the record in this case will not support a recovery for [petitioner]. The factual findings of the district court, rather than showing a breach of duty by the Government, demonstrate that OEO had taken reasonable measures to provide for security at the Kilmer Center.

The court then analyzed the record and the district court's findings; it concluded (Pet. App. 20a-21a):

> The record reveals that OEO, in light of the supervisory nature of its responsibilities, properly discharged whatever obligation it had to assure adequate security at Kilmer. In sum, it appears that OEO after formulating its policies, made them known to FEC, informed FEC of its [FEC's] responsibilities, required FEC to take certain basic precautions, and provided FEC with sufficient authorization to do what was necessary in order to perform its functions.

> Lacking operational control over the activities at Kilmer, the United States cannot be held liable for the lack of proper security facilities at Camp Kilmer.

Judge Adams concurred in the court's conclusion that the government was not vicariously liable, but he would have found the government negligent in failing to protect petitioner from his assailant (Pet. App. 22a-34a). Judge Adams remarked, however, that his "difference with the majority rests primarily upon our divergent interpretation of the factual record in this case" (Pet. App. 25a).

ARGUMENT

Petitioner appears to contend that the court of appeals erred in concluding that OEO was not negligent in taking reasonable measures to assure adequate security at the Camp Kilmer Job Corps Center (Pet. App. 16a-21a). This issue does not warrant review by this Court. First, it depends on facts peculiar to this record. Second, the district court did not find that employees of the United States were directly negligent. Only out of an abundance of concern did the court of appeals address the "possibility" that the district court had adopted any theory of direct negligence on which to predicate liability (Pet. App. 16a-17a).[5]

[5] The only arguable basis for concluding that the district court made such a finding is its statement that the Government "breached its duty [to exercise reasonable care to ensure the safety of persons coming in contact with its trainees]

The "direct negligence" issue was neither briefed nor argued in the court of appeals, and that court did not decide whether the government owed petitioner any duty to protect him from enrollees (Pet. App. 17a). It merely decided, on the basis of the record, that even assuming such a duty existed, the government did not breach it (*id.* at 18a-21a). The aspect of the decision of which petitioner complains thus did not resolve any disputed question of law; as Judge Adams explained (*id.* at 25a), the court simply dealt with factual inferences. We rely on the court of appeals' analysis of these questions.[6]

when it failed to provide for adequate safety precautions and is thus liable to the plaintiff regardless of the fact that it delegated certain functions to [Federal Electric Company], an independent contractor" (Pet. App. 67a). But it is apparent that the district court was referring to the "inherently dangerous activity" doctrine of liability, under which it held the United States vicariously liable "for the negligence of F.E.C." (Pet. App. 66a), rather than to any direct negligence theory.

[6] The court's conclusion that the Act does not allow a contractor's negligence to be imputed to the government under the "inherently dangerous activity" doctrine (Pet. App. 12a-16a) appears to perpetuate a conflict among the circuits on this matter. Compare *McGarry* v. *United States*, 549 F.2d 587 (C.A. 9), certiorari denied, October 31, 1977 (No. 77-286), and *Thorne* v. *United States*, 479 F.2d 804 (C.A. 9), with this case and *United States* v. *Page*, 350 F.2d 28, 34 (C.A. 10), certiorari denied, 382 U.S. 979. Although the Court denied our petition for certiorari in *McGarry*, we continue to believe that the scope of federal liability for the torts of contractors performing "inherently dangerous" tasks is important and should be decided by this Court. The present case, however, does not require resolution of the question. Petitioner does not discuss the conflict or challenge the court's

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 1978.

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ruling that the "inherently dangerous activity" doctrine is inconsistent with the independent contractor limitation of the Act. Moreover, whether that doctrine could be applied to the facts of the case is highly doubtful. As the court of appeals noted, it is not at all clear whether a Job Corps center is an "inherently dangerous activity" (Pet. App. 13a n. 10). Indeed, under New Jersey law the doctrine may not be available to petitioner even if the Center was inherently dangerous, because petitioner was an employee of the contractor, not a third party (*ibid.*). There is no reason for this Court to address these questions of state law or to attempt to resolve the disputed characterization of Job Corps centers.

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